Supreme Court, U. S.
FILED
FEB 23 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1169

ARTHUR H. KEYES and LUCILLE KEYES, on behalf of themselves and others similarly situated,
Petitioners,

v.

THE DISTRICT OF COLUMBIA, a Municipal Corporation and WALTER E. WASHINGTON, and KENNETH BACK,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

PHILIP W. AMRAM
GILBERT HAHN, JR.
11th Floor
1150 Connecticut Ave., N.W.
Washington, D. C. 20036
Attorneys for Petitioners

MARY KATHLEEN HITE
JOSEPH S. FINKELSTEIN
WOLF, BLOCK, SCHORR AND SOLIS-COHEN
1150 Connecticut Ave., N.W.
Washington, D. C. 20036
Of Counsel

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Arthur H. Keyes, et al., petitioners, appellees below, respectfully pray that a writ of certiorari issue to review the

judgment of the District of Columbia Court of Appeals entered on July 23, 1976 in District of Columbia v. Keyes, No. 8790.

OPINIONS BELOW

The Opinion of the Court of Appeals in the instant case is reported at 362 A. 2d 729 (1976) and is reprinted in the Appendix, infra, p. A-1.

The Opinions of the Superior Court of the District of Columbia, Tax Division, in the instant case, are unreported and are reprinted in the Appendix, infra, p. A-16 and p. A-60. The Opinion of the District of Columbia Court of Appeals in the prior companion case of District of Columbia v. Green is reported at 310 A.2d 848 (1973) and is reprinted in the Appendix, infra, p. A-74.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was initially entered on July 23, 1976. Petitioners' Petition for Rehearing or Rehearing En Banc was timely filed on September 16, 1976, and was denied by the Court of Appeals on November 26, 1976. On December 27, 1976 the Court of Appeals filed an order granting a stay of mandate for the period of time permitted by law for the filing of a petition for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Where a municipality has collected from 34,000 of its 96,000 homeowners unconstitutionally discriminatory taxes, averaging less than $50 per taxpayer, by concealing and misrepresenting its assessment formulae, and by deceit of

its citizen-taxpayers, may the local court frustrate the taxpayers' enforcement of their federal right to refund by

(a) requiring the action for refund to be brought under the local statutory administrative procedure and to be brought at a date prior to the discovery of the concealment, misrepresentation and deceit, and

(b) transforming the legal right to a refund into a right based on "equitable principles", and

(c) asserting invalid non-federal grounds to avoid enforcement of the federal right to refund, particularly by asserting (1) that a refund of the unconstitutionally discriminatory taxes would be a precedent; (2) that the municipality has spent the taxes unconstitu-

tionally collected; (3) that the municipality has budgetary problems; and (4) that the grant of an injunction against future collection of the unconstitutionally discriminatory taxes for future years is a full and adequate remedy to the taxpayers?

2. Can a federal right to refund of an unconstitutionally discriminatory tax, unknown to the taxpayer because of secrecy, concealment and deceit on the part of the taxing authority be frustrated by the application of local rules of procedure which forbid all recovery by the injured taxpayer, who moves promptly for recovery after the unconstitutionality is revealed?

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in part:

...nor [shall any person] be deprived of...property, without due process of law...

STATEMENT OF THE CASE

Prior to fiscal year 1973 all the 96,000 single-family residential properties in the District of Columbia were assessed for real estate tax purposes in the same way. The fair market value of the property was reduced to a fixed percentage known as the "level of assessment". Prior to fiscal year 1973 the "level of assessment" was 55 percent of fair market value for all single-family properties. (App. pp. A-2, A-77.)

In preparing the assessments for fiscal year 1973, the responsible officials of the District of Columbia charged with the administration of the tax laws, acting secretly and without notice to the public as required by the District of Columbia Administrative Procedures Act,

Title 1 D.C. Code §1501 et seq., raised the level of assessment for approximately 34,000 of the 96,000 homeowners in the city from 55 to 60 percent. (App. pp. A-63/65.) The tax for fiscal year 1973, based upon these secret and unrevealed unequal assessments was levied and collected from the taxpayers in question. (App. pp. A-63/65.)

In preparing the assessments for the following fiscal year 1974, the same officials of the District raised the level of assessment for an additional 44,000 of the 96,000 homeowners from 55 to 60 percent. However, before the taxes were levied and collected for fiscal year 1974, the discriminatory assessments were "reluctantly made public" by the District of Columbia officials in June, 1973, during the trial of an action brought to enjoin the fiscal year 1974 taxes and en-

titled Green v. District of Columbia. Accordingly, the Superior Court of the District of Columbia enjoined the levy and collection of these taxes for fiscal year 1974 as unconstitutional as denying equal protection as read into the Fifth Amendment. The District of Columbia Court of Appeals affirmed. District of Columbia v. Green, 310 A.2d 348 (1973). (App. p.A-74)

The trial court in Green, quoted in the opinion of the Court of Appeals in Green, supra, alternatively characterized the conduct of the District as "surrounded by unfairness, secrecy and lack of candor" and as "deceit of the populace". (App. p. A-80) For purposes of this Petition, we will refer throughout to the shorter definition, "deceit".

The instant case (Keyes) was thereupon filed as a class action to recover the unconstitutional tax levied and paid

by the 34,000 homeowners for fiscal year 1973, at a time prior to the revelation of the deceit of the District officials. The trial court ordered a refund of the unconstitutional tax collected. (App. pp. A-69/73.) The trial court ignored the defense of the District that taxpayers had failed to take timely administrative appeals, and directed refund of the unconstitutional taxes.

On appeal, the District of Columbia Court of Appeals acknowledged the taxes to have been unconstitutionally levied and collected, but nevertheless reversed. The court held that taxpayers were not entitled to relief because they had failed to take timely administrative appeals. The court rejected the position of the trial court that the deceit on the part of the District officials excused the taxpayers from taking administrative

appeals from secret and concealed official action. (App. pp. A-5/8.)

The Court of Appeals also held that the taxpayers were not entitled to relief for fiscal year 1973 because, among other reasons, refunding the unconstitutional taxes would establish a precedent, the District's budget was tight, the District had already disbursed the unconstitutionally collected taxes, and the court had already granted the taxpayers full relief in Green, by enjoining the unconstitutional taxes for the later fiscal year 1974. (App. pp. A-8/15.)

In effect, the Court of Appeals treated the taxpayers' suit not as a demand for refund based on unconstitutional action, but as a suit for refund under the District of Columbia Code and on "equitable principles".

The fundamental federal questions of

the federal constitutional rights of the taxpayers were first raised by taxpayers in their initial pleading, the Petition in the Tax Division of Superior Court, as follows:

> 6. Petitioners and upon information and belief, the approximately 34,000 other taxpayers similarly situated, were deceived by respondents into believing that their property taxes for Fiscal Year 1973 were being increased solely because the estimated market value of their homes had risen, and did not know until their time for taking administrative appeals had expired that the increased assessments were not due entirely to market value increases and that all taxpayers were not assessed at the same level of assessment (debasement factor) for Fiscal Year 1973.
>
> * * * *
>
> 9. As a result of the respondents' above stated actions, the petitioners and the approximately 34,000 taxpayers similarly situated have been deprived of due process afforded them by the Fifth Amendment to the United States Constitution and have been deprived of their rights under the District of Columbia Adminis-

trative Procedure Act.

These questions were ruled in favor of the taxpayers by the trial judge in the Opinion of the trial court. (App. pp. A-37, A-54/6, A-66/7.)

The question of the need for administrative appeals was raised sua sponte by the Court of Appeals after argument in its Order of February 27, 1976 (App. pp. A-90/91) as follows:

> . . .are the appellees in this case barred from the relief sought by reason of their failure to pursue their statutory remedies in seeking refunds for the fiscal year here involved?

After a detailed analysis of this issue, Petitioners said:

> No case in the District of Columbia, and no case we have found anywhere in the United States, has ever held that a municipal corporation, in administeringits taxing authority, may profit from its own wrong and the defrauded citizen will be without any remedy. This would reach constitutional

> levels of the taking of property without due process of law.

Other alleged non-federal grounds for avoiding enforcement of the taxpayers' federal rights appear in the opinion of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

A. This proceeding involves important questions of due process, with respect to the refund to 34,000 homeowners of unconstitutionally levied and collected real estate taxes, pursuant to unconstitutional discrimination and deceit on the part of the officials of the municipality.

B. This proceeding involves an important and novel application of the principle that the enforcement of a federal constitutional right in a real estate tax refund case may not be frustrated by the application of inadequate local non-federal grounds to avoid enforcement of

the federal constitutional rights of taxpayers.

I.

This case involves no right under local law. The only right which plaintiffs sought to enforce is a federal right under the Constitution. This is clear in the opinion of the Superior Court (App. pp. A-66/68) and is conceded in the opinion of the Court of Appeals (App. p. A-5). The Court of Appeals could not have done otherwise, since it had already decided in Green that the District's action was unconstitutional. (App. pp. A-3, A-85/86) As the Court of Appeals said in Green:

> But the District did not follow this course. Instead, as the record shows, it chose to apply different debasement factors to the same class of property in the same year and, in so doing, denied the appellees equal protection of the laws by discriminating among residential taxpayers.15/ (App. pp. A-85/86) (Emphasis supplied.)
>
> 15/ Bolling v. Sharpe, 347 U.S. 497 (1954) reads the Fourteenth Amendment equal protection clause into the due process clause of the Fifth Amendment to apply it to the District of Columbia.

The Superior Court had enforced the federal right here. The Court of Appeals reversed and denied enforcement of the federal right.

In so doing, the Court of Appeals erroneously treated the plaintiffs' cause of action, not as one for the enforcement of a federal constitutional right, but as a cause of action (1) under the District of Columbia Code, and (2) under "equitable principles". (App. p. A-4.)

This Petition is filed to seek review in this Court of the propriety of the denial and destruction of the fede-

ral rights of the petitioner taxpayers.

The recognition of a federal right, based on denial of equal protection, to refund of unconstitutionally discriminatory taxes is not novel. Ward v. Board of City Commissioners, 253 U.S. 17 (1920); Atchison, Topeka & Santa Fe Ry. v. O'Connor, 223 U.S. 280 (1912). This is particularly true if the unconstitutionality, as here, is "due to a purposeful discrimination", evidenced by "a systematic under-valuation of the property of some taxpayers and a systematic over-valuation of the property of others". Snowden v. Hughes, 321 U.S. 1, 9 (1944) and cases cited therein.

II.

The Court of Appeals refused to enforce the federal right of the taxpayers. Each reason given was an asserted invocation of a local non-federal ground.

Each reason was invalid and will be separately discussed hereafter.

This Court has reserved to itself the right to determine whether an asserted non-federal ground (whether substantive or procedural) is adequate to defeat a federal right, and prevent review by this Court. Demorest v. City Bank Farmers' Trust Co., 321 U.S. 36, 42 (1944) and cases cited in footnote 5; Lawrence v. State Tax Commission, 286 U.S. 276, 282 (1932); Davis v. Wechsler, 263 U.S. 22 (1923); Henry v. Mississippi, 379 U.S. 443 (1965). And see the excellent collection of cases in Monger v. Florida, 405 U.S. 958 (1972).

This is a classic case for the application of the rule.

III.

The principal ground stated by the Court of Appeals to defeat the taxpayers'

federal right, which occupies four pages of the court's opinion, is the failure of the taxpayers to pursue the statutory administrative procedure of the District of Columbia Code.

The Court of Appeals applied the following principle:

> Recovery of taxes illegally or erroneously assessed and voluntarily paid was not permitted at common law and is a mater within the purview of the legislative brach. Therefore, refunds of taxes so assessed and paid will not be made absent an authorizing statute. (App. p. A-5.)

From this, it imposed an absolute duty in this case upon the taxpayers to follow the statutory administrative remedies for fiscal year 1973 (App. p. A-6).

All this would be relevant if the payments here had been "voluntary". But, by the very foundation of this case, the payments for fiscal year 1973 by the Petitioners were "involuntary".

As the Court of Appeals said in Green (App. p. A-80) quoting the Superior Court in Green with approval:

> 10/ In its words: "The court is not persuaded by this argument and cannot believe that Congress intended that the statute be subverted to include deceit of the populace, by either unintentional oral and written misinformation (at best) or by deliberate misstatement (or deliberate omission) of oral and written information (at worst)."

Where, as here, the payments were innocently made by the taxpayers in reliance upon the representations of the taxing authorities, and without any knowledge of their "deceit", the payment should be deemed "involuntary" for the purpose of their refund. Atchison, Topeka & Santa Fe Ry. v. O'Connor, 223 U.S. 280 (1912); Ward v. Love County, 253 U.S. 17 (1920); City of Franklin v. Coleman

Bros. Corp., 152 F.2d 527 (1945) cert. den. 328 U.S. 844 (1945); Chicago, Burlington & Quincy R. Co. v. Babcock, 204 U.S. 585 (1907); Kingsford Chemical Co. v. Kingsford, 347 Mich. 91 (1956).

As a result, the right of the taxpayers to a refund in this case is not statutory. It is a common law right, "independent of any statute", and without any obligation to follow any statutory administrative procedure. The statutory administrative procedure is not exclusive; the taxpayers need not follow it. Ward, supra; City of Franklin, supra.

Refusal of refunds of the unconstitutional taxes cannot be based upon any alleged failure of the taxpayers to proceed through the administrative process.

Further, even if the taxpayers were required to undertake the administrative

procedure, failure to undertake it could not be used in this case to defeat the federal right.

The Court of Appeals in Green (App. p. A-80) had affirmed a finding of the trial court in that case that:

> . . .since the six named petitioners (appellees) who bypassed the Board could not have known of the changed level of assessment until it was reluctantly made public in this lawsuit in June, 1973, they were unable to pursue the administrative remedy created by statute prior to cut off date of April 1, 1973.

The trial court in Keyes, on the basis of this earlier finding of the Court of Appeals, found that the taxpayers:

> . . .could not have known of the changed level of assessment until June, 1973 and were accordingly denied viable access to the statutory administrative procedure within the permissible time. (App. p. A-54)

In the face of the decisions of this Court cited above, the Court of Appeals could

not validly refuse to enforce the federal right because of an alleged procedural error of the taxpayers in failing to initiate an administrative proceeding at a time when the existence of the claim for refund was unknown and unknowable because of the "deceit" of the District officials.

IV.

The Court of Appeals suggests that the refund of the taxes in this case would be a precedent, ostensibly an undesirable one. The argument is a fallacy.

The precedents already exist in the opinions of this Court cited above.

V.

The Court of Appeals suggests that the refund of the taxes should be refused because the District has already spent the money which it received.

This point has already been rejected

by this Court. In Ward, supra, the defendant had disbursed a portion of the moneys collected to the state and other municipal bodies. This Court rejected this as a defense and held that, in legal contemplation, the county had received the money "for the use and benefit of the claimants and should respond to them accordingly". Ward, supra, at p. 24.

VI.

The Court of Appeals suggests that the federal right to refund should be rejected because of the budgetary problems of the District.

We have found no case in this Court or in any United States Court of Appeals which has denied taxpayers their federal right to the refund of unconstitutional taxes because of the financial burden on the municipality to make the refund.

The action of the Court of Appeals in reversing the Superior Court on this ground amounts to a negation of the taxpayers' federal right and, in the words of Mr. Justice van Devanter, in Ward, supra, constitutes a taking of their property without due process of law.

Further, as a practical matter, the whole amount in issue here is in the range of 1.1 to 1.6 million (App. p. A-13). The District's budget, a matter of public record, exceeds 1,000 million. The amount in issue is at most 1/15th of 1% of the District's current budget. One major fire for which the District may be responsible or a dozen or so major trespass cases during the year could lead to judgments of an equivalent amount. Should recovery on such judgments be denied because of budgetary

stringency? And can these deceived taxpayers be put into a second-class status because of budgetary stringency?

The only authority cited by the Court of Appeals is Southern Pacific Co. v. Cochise County, 92 Ariz. 395, 377 P. 2d 770 (1963). (App. p. A-11)

This was an action based on alleged over-valuation of railroad property and the refusal of the Board of Equalization to grant relief. Suit was brought for refund of a portion of the taxes and for an injunction for the future.

The lower court dismissed the complaint. The Supreme Court of Arizona reversed and remanded the case for trial on the request for injunction, but affirmed the dismissal of the cause of action for refund.

The opinion (377 P.2d at 777-8) interprets the Arizona Constitution and

the powers of the State Tax Commission. It finds (exactly the opposite of the present case) that all the assessments and all the actions of the Commission and all the overvaluation of railroad property were matters of public knowledge and "notoriety", and that any overvaluation had been in effect "for many years".

The court found, under these facts, that the railroad's payments were "voluntary". It found that the railroad, having had full knowledge of all the facts for years, was required to "scrupulously follow the statutory procedures" which it had not done.

It found the railroad responsible for its own position and chastised it for its laches. It found that the railroad had permitted municipal bond issues to be floated in reliance on the assess-

ment system under attack. It noted critically that the railroad

> . . .has not until now sought the assistance of this Court to compel a discontinuance of what has long been the settled practice. Such non-action so long continued culminates in the present threat to the existence of government itself. Southern Pacific Co. v. Cochise County, supra, at p. 778.

It is difficult to conceive of a case more inapposite.

VII.

Finally, the Court of Appeals suggests that the grant of the injunction in Green against the unconstitutional discrimination for fiscal year 1974 is a full and complete remedy for the unconstitutional discrimination for fiscal year 1973.

In other words, where there is an admitted unconstitutional discrimination and the exaction from 34,000 taxpayers of

unconstitutional taxes, the federal right to refund, required by the constitution and the decisions of this Court, will be fully satisfied by a decree which says to the municipality:

> "Gentlemen, you may keep all the money you unconstitutionally exacted, but do not do it again in any future years."

This is not hyperbole; it is exactly what the Court of Appeals said (App. p. A-15):

> In Green, we went as far as equity requires us to go and so we will not go further here.

The Court of Appeals misunderstood the nature of this case. The right invoked here is not a discretionary right, which a chancellor may grant or refuse as he chooses. The right invoked is a legal right, constitutional and federal in nature. Its rejection is a taking of property without due process of law.

It is true that this proceeding is a class suit for 34,000 plaintiffs, but the use of the class action device does not convert the federal constitutional right into a lesser right which the court may reject in its discretion. cf. McLanahan v. State Tax Commission of Arizona, 411 U.S. 164 (1973).

As Mr. Justice Holmes said in Atchison, supra, at p. 285, the taxpayer's right is "an action at law to recover back what he has paid". As we noted earlier under point I, this is not an action for refund under the District of Columbia Code nor is it an action for refund "under equitable principles". (App. p. A-4)

The use of the form of a class action cannot change the constitutional nature of the federal right.

CONCLUSION

In the absence of review by this Court, the Court of Appeals of the District of Columbia will have successfully frustrated 34,000 homeowners of the City of Washington in the enforcement of their federal constitutional rights, and will have permitted the District authorities, in the words of Ward, supra, to appropriate their property without due process of law.

Petitioners respectfully urge that the writ of certiorari issue.

Respectfully submitted,

PHILIP W. AMRAM, ESQ.
GILBERT HAHN, JR., ESQ.
11th Floor
1150 Connecticut Ave.,N.W.
Washington, D. C. 20036

Attorneys for Petitioners

APPENDIX

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 8790

THE DISTRICT OF COLUMBIA, a Municipal Corporation,
and
WALTER E. WASHINGTON, and KENNETH BACK,
APPELLANTS,

v.

ARTHUR H. KEYES, JR., and LUCILLE KEYES,
On behalf of themselves and others similarly situated,
APPELLEES.

Appeal from the Superior Court of the
District of Columbia

(Argued December 5, 1974 * Decided July 23, 1976)

Louis P. Robbins, Principal Assistant Corporation Counsel, with whom *C. Francis Murphy*, Corporation Counsel at the time the brief was filed, *Henry E. Wixon* and *Richard L. Aguglia*, Assistant Corporation Counsel, were on the brief, for appellants.

Gilbert Hahn, Jr., with whom *Jack C. Sando* was on the brief, for appellees.

Before KELLY and GALLAGHER, Associate Judges, and PAIR, Associate Judge, Retired.

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* At the court's request, supplemental post-argument memoranda were submitted by the parties in March 1976.

GALLAGHER, *Associate Judge*: This is an appeal from the Tax Division of the Superior Court of the District of Columbia. The appellees, Arthur H. Keyes, Jr. and Lucille Keyes, filed suit, on behalf of themselves and others similarly situated, against the District of Columbia, Mayor Walter E. Washington, and the Director of the Department of Finance and Revenue, Kenneth Back, appellants, for partial refunds of taxes paid in fiscal year 1973 on all single-family residential properties in the District of Columbia which were assessed at 60% of estimated market value. The trial court held that the appellees are entitled to the relief sought. We reverse.

During calendar year 1971, the level of assessment [1] on approximately one-third of the single-family residential properties [2] in the District of Columbia was raised from 55% to 60% of estimated market value for fiscal year 1973.[3] This change in the level of assessment was part of a plan by the Department of Finance and Revenue of the District of Columbia to achieve a phased increase in the debasement factor (level of assessement) for all single-family residential properties in the District

[1] The level of assessment is also known as the "debasement factor" or "multiplier." This element in the tax computation is the percentage of estimated market value upon which the tax is levied. The assessed value or assessment for an individual piece of real property is obtained by multiplying the estimated market value of the property by the level of assessment. Thus, a dwelling valued at $100,000 is assessed at $55,000 if a 55% debasement factor is applied and at $60,000 if a 60% debasement factor is applied.

[2] It is estimated that this suit involves approximately 34,000 properties.

[3] Assessments of real property are made an a *calendar* year basis for the subsequent *fiscal* year. Fiscal year 1973 ran from July 1, 1972 to June 30, 1973.

of Columbia. Appellants seek to have their refunds measured by the difference between their actual tax bills which they paid for fiscal year 1973 (for which a 60% debasement factor was applied) and the lower tax bills which they would have received if a 55% debasement factor had been applied, plus 6% interest per annum.

In May 1973, an earlier class action was brought by several single-family residential property taxpayers to enjoin the District of Columbia from using unequal levels of assessment in taxing single-family residential properties for fiscal year 1974. This court, in *District of Columbia v. Green*, D.C.App., 310 A.2d 848 (1973) (hereinafter *Green*), affirmed the trial court and held that the District of Columbia's "stairstep" approach to achieve an increased debasement factor for all single-family residential properties was unconstitutional as it resulted in different debasement factors being applied to the same class of property in the same year.[4] Injunctive relief was granted for fiscal year 1974, and the "stairstep" plan was prohibited.

The present suit was brought as an uncertified [5] class action to recover that portion of fiscal year 1973 residen-

[4] *District of Columbia v. Green, supra* at 855. Yet not all inequalities in the assessment of property taxes are necessarily unconstitutional. To illustrate, it has occurred frequently that taxpayers pay different tax bills on property of identical values due to the inability of the assessors to value all property every year. This particular type of lack of equalization between taxpayers has been held "permissible because caused by logistical problems which may be temporarily beyond the power of the city to correct." *District of Columbia v. Green, supra* at 856. We there concluded, in effect, that this logistical factor was not reasonably established.

[5] The trial judge held that certification as a class action and notice to members of the class were unnecessary because

tial property taxes paid which was attributable to the increase of 5% in the level of assessment.[6] The District of Columbia appeals the decision of the trial court granting refunds to the taxpayers on the grounds that (1) under traditional principles of equity and tax reform litigation only prospective relief should have been granted; (2) refunds should not have been granted without proof that appellees bore a substantially disproportionate share of the real property tax burden; (3) the trial judge erred in not permitting the District of Columbia to prove that appellees did not bear a substantially disproportionate share of the real property tax burden; and (4) the trial court erred in permitting appellees to proceed as a class for refunds without certification and individual notice. We hold that appellees are not entitled to refunds either under the statutes of this jurisdiction or by virtue of equitable principles.

The trial court held, insofar as pertinent here, (1) that under the doctrine of collateral estoppel the legal and factual issues as they relate to the conduct of appellants are controlled by the result in *Green*, and (2) that

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the rules applicable to the Tax Division omitted any mention of class action procedures. We note that effective September 3, 1975, Super. Ct. Civ. R. 23, 23-I and 23-II were incorporated by reference into the Tax Division rules, and purported class action tax suits are now subject to the same criteria with respect to prerequisites, maintainability, and notice as other civil suits. *See* Super. Ct. Tax R. 3.

[6] Notices of tax assessments for fiscal year 1973 were sent out during the period from November 1, 1971 to March 1, 1972. April 2, 1972 was the last day to appeal to the Board of Equalization and Review for any tax assessment for fiscal year 1973. In September 1972 the first installment on property taxes for fiscal year 1973 was due, with the second and final installment due during the month of March 1973.

under principles of equity it would be inappropriate to deny refunds in this case. We believe that, even if the first holding were assumed to be correct, the second is not.

Preliminarily, we observe that this suit was brought in equity and was decided solely on equitable grounds. No statutory remedy was sought or granted and one of the premises of appellees' approach to this litigation is that their potential legal remedies, if any, were inadequate. The rationale of the trial court is essentially that because appellees were held to be entitled to injunctive relief in *Green*, they are *ipso facto* entitled to tax refunds in this case.

Recovery of taxes illegally or erroneously assessed and voluntarily paid was not permitted at common law and is a matter within the purview of the legislative branch. Therefore, refunds of taxes so assessed and paid will not be made absent an authorizing statute. *District of Columbia v. McFall*, 88 U.S.App. D.C. 217, 188 F.2d 991 (1951); *Lindner v. District of Columbia*, D.C.Mun.App., 32 A.2d 540 (1943).[7] Under the statutory procedure

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[7] *See also, e.g., Snyderman v. Isaacs*, 31 Ill. 2d 192, 201 N.E.2d 106 (1964); *People ex rel. City of Highland Park v. McKibbin*, 380 Ill. 447, 44 N.E.2d 449 (1942), *cert. denied*, 318 U.S. 778 (1943); *People ex rel. Eitel v. Lindheimer*, 371 Ill. 367, 21 N.E.2d 318, *appeal dismissed sub nom., Illinois ex rel. Eitel v. Toman*, 308 U.S. 505 (1939); *Drummond v. Maine Employment Security Comm'n*, 157 Me. 404, 173 A.2d 353 (1961); *Baltimore County v. Churchill, Ltd.*, 271 Md. 1, 313 A.2d 829, *appeal dismissed*, 417 U.S. 902 (1974); *Comptroller of the Treasury v. Campanella*, 265 Md. 478, 290 A.2d 475 (1972); *Wasena Housing Corp. v. Levay*, 188 Md. 383, 52 A.2d 903 (1947); *Universal Film Exchanges, Inc. v. Board of Finance and Revenue*, 409 Pa. 180, 185 A.2d 542 (1962), *cert. denied*, 372 U.S. 958 (1963); *Calvert Distillers Corp. v. Board of Finance and Revenue*, 376 Pa. 476, 103 A.2d 668 (1954).

applicable to this case, the recovery of refunds through appeal to the Superior Court requires, as a first step, a complaint to the Board of Equalization and Review.[8] Subject matter jurisdiction of the Superior Court does not attach until that prerequisite has been satisfied,[9] and a refund based on a final determination of the Superior Court presupposes that the taxpayer has complied with the procedure mandated by the legislature. If "aggrieved" for any reason, the taxpayer must appeal within the permitted time to the Board of Equalization and Review. D.C. Code 1973, § 47-709. This was not done in this case. The taxpayers failed to follow their administrative remedies for fiscal year 1973.

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[8] D.C. Code 1973, § 47-709 reads in pertinent part:

> Any person aggrieved by any assessment, equalization or valuation made may within six months after October 1 of the year in which such assessment, equalization, or valuation is made, appeal from such assessment, equalization, or valuation in the same manner and to the same extent as provided in sections 47-2403 and 47-2404; *Provided, however*, That such person shall have first made his complaint to the Board of Equalization and Review respecting such assessment as herein provided . . . .

This language is also codified in D.C. Code 1973, § 47-2405. The relevant portions of these code provisions were repealed effective June 30, 1975, and the above requirement is now found in D.C. Code 1975 Supp., § 47-646(i).

D.C. Code 1973, § 47-2407 reads:

> Any sum finally determined by the Superior Court to have been erroneously paid by or collected from the taxpayer shall be refunded by the District to the taxpayer from its annual appropriation for refunding erroneously paid taxes in said District.

[9] Payment in full of the tax due is also jurisdictional. *See, e.g., George Hyman Constr. Co. v. District of Columbia*, D.C.App., 315 A.2d 175 (1974); *District of Columbia v. Berenter*, 151 U.S.App.D.C. 196, 466 F.2d 367 (1972).

Appellees contend that the administrative remedies could not have been pursued by any of the taxpayers for fiscal year 1973 because of prior concealment of the "stair-step" plan by District officials. In *Green*, however, we noted that three petitioners "ascertained the existence of, and raised as an issue, the increased level of assessment of their properties" before the Board of Equalization and Review for fiscal year 1974. *District of Columbia v. Green, supra* at 851. These taxpayers not only pursued their administrative remedies but in the process also discovered the now prohibited practice of applying different debasement factors to similarly situated taxpayers. Consequently, we cannot assume, as the trial court did in the case now before us, that a timely administrative challenge to the 1973 taxes for the purpose of obtaining refunds was unavailable or would have been fruitless. The 1973 taxpayers were just as aware as the 1974 taxpayers that their tax bills had been increased.

In *Green*, we agreed with the trial court that the circumstances there were extraordinary and, further, that it would be inequitable to allow those who had bypassed the Board to proceed immediately with the action for injunction while requiring those who had gone to the Board to wait until the expiration of the statutory period before proceeding. Our conclusion was: "The evidence of record supports the findings of the trial court and, as a consequence, it was not error to entertain the [complaint] for injunction." *District of Columbia v. Green, supra* at 853. Thus, we specifically limited our analysis to the context of the relief sought.[10] That is to say, we

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[10] *Tumulty v. District of Columbia*, 69 U.S.App.D.C. 390, 102 F.2d 254 (1939) was cited in *Green* for the proposition that when an assessment is void, resort to equity may be had

held only that the circumstances before the court were so extraordinary as to warrant a prohibitive writ restraining the practice for fiscal year 1974 and subsequent years. Appellees argue that we should extend this holding to the instant refund case for the prior fiscal year of 1973. We disagree and hold that equitable intervention is not justified in this case.[11]

Moreover, even assuming it were appropriate to apply the principles of equity to the facts before us, we do not

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without following statutory remedies. *District of Columbia v. Green, supra* at 853. *Tumulty*, however, involved the question of whether an invalid District of Columbia tax claim, filed in a receivership proceeding, could be attacked in that proceeding by parties with other claims against the company in receivership. The United States Court of Appeals held that equity would permit such a collateral attack on the tax claim. Hence, the relief sought and granted in *Tumulty* was preventive in nature (because it precluded assertion of the invalid tax claim) and therefore analogous to the injunctive relief sought and granted in *Green*, but not applicable to the refunds sought here.

[11] We note that the fiscal year 1974 taxpayers who resorted to the Board of Equalization and Review and raised the issue of unequal debasement factors found the Board unresponsive to their arguments. Hence, in *Green*, where only injunctive relief was sought, we stated that a taxpayer in that case had "no meaningful ability to challenge his assessment at all" because the Board declined to inquire into the non-judgmental aspects of the assessment process. *District of Columbia v. Green, supra* at 856. This was one of the extraordinary circumstances upon which the grant of injunctive relief in *Green* was based. However, the fact that an administrative body may wrongly perceive the nature or scope of its powers or responsibilities in a given instance is not a justification for bypassing that body in all instances when it is an essential element in a procedure of purely statutory origin. In fact, it would be a rare instance when taxpayers would not bypass the Board at great peril.

believe that appellees would be entitled to refunds. Regardless of the specific context involved, the distinguishing feature of equity jurisdiction is ". . . the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). Thus, it is characteristic of a court of equity that it must take a comprehensive view of the issues before it; and as a result its extraordinary remedies are to be meted out with care. Where the public interest is involved,

> [c]ourts of equity may, and frequently do, go much farther both to give *and withhold* relief in furtherance of the public interest than they are accustomed to go when only private interests are involved. *Pennsylvania v. Williams*, 294 U.S. 176, 185; *Central Kentucky Gas Co. v. Railroad Commission*, 290 U.S. 264, 270-273; *Harrisonville v. W. S. Dickey Clay Co.*, 289 U.S. 334, 338; *Beasley v. Texas & Pacific Ry. Co.*, 191 U.S. 492, 497; *Joy v. St. Louis*, [138 U.S. 1,] 47; *Texas & Pacific Ry. Co. v. Marshall*, 136 U.S. 393, 405-406; *Conger v. New York, W. S. & B. R. Co.*, 120 N. Y. 29, 32, 33; 23 N. E. 983. [*Virginian Ry. v. System Federation 40*, 300 U.S. 515, 552 (1937) (emphasis added). *See also United States v. First National City Bank*, 379 U.S. 378 (1965) and cases cited therein at 383.]

This principle was applied in *Blair v. Freeman*, 125 U.S.App.D.C. 207, 370 F.2d 229 (1966) which involved a marketing regulation of the Secretary of Agriculture who authorized premium payments to dairy farmers in certain locations. The payments were made from a settlement fund or equalization pool intended to apportion among producers the benefits and burdens of varia-

tions in the fluid milk market. One side effect of the Secretary's order was to reduce statutorily mandated uniform minimum prices received by other farmers not in the specified geographical areas; and this adversely affected group sought a declaratory judgment and an injunction restraining enforcement of the regulation. The trial court dismissed the complaint and the United States Court of Appeals reversed and granted declaratory and injunctive relief but excluded the possibility of refunds [12] for the following reason:

> Appellants have invoked the aid of equity in seeking a declaration of their rights and the prevention of further interference with them. We are concerned lest a declaration of invalidity in the context of such an action be deemed to require refund of moneys illegally paid and received under an invalid order. A court of equity may tailor its relief with a critical and balanced view of the ramifications of its decision, including in the overall public interest a consideration of the interests of those not before the court. [125 U.S.App.D.C. at 217, 370 F.2d at 239 (footnote omitted).]

In treating the refund issue, the court considered a variety of factors including the complexity of the recoupment and refund process, the large sums of money and large number of farmers involved, the long delay in filing suit, the difficulty in determining if the plaintiffs

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[12] The court recognized that litigation as to refunds was imminent because the appellants' interest in the settlement fund was sufficient to confer standing for such a suit and because the appellants had sought an order requiring an escrow pendente lite. 125 U.S.App.D.C. at 217 n.39, 370 F.2d at 239 n.39.

had received offsetting advantages from other aspects of the equalization system, and the fact that the court was convinced that under all of the circumstances "the producers benefited are not necessarily to be held to account for an ultra vires action taken by the Secretary in what he conceived to be the public interest." 125 U.S.App.D.C. at 217, 370 F.2d at 239 (footnote omitted).

We do not mean to say that these considerations are dispositive of the issue before us, or even that all are relevant to the case at hand. Rather, we recite them because they demonstrate the mode of analysis which should be applied by a court of equity in cases such as this.

Prospective application of judicial decisions is a practice often followed, particularly where retrospective operation of a decision would create economic hardship which would outweigh the beneficial effect of retroactivity.[13]

In *Southern Pacific Co. v. Cochise County*, 95 Ariz. 395, 377 P.2d 770 (1963) (en banc) it was held that while real property taxes based on discriminatory assessments had been illegally collected from a taxpayer railroad, only prospective injunctive relief would be granted [14] because "[t]he refund which appellant seeks

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[13] This doctrine is sometimes applied when a decision overrules prior law or regulation. *See, e.g., Safarik v. Udall*, 113 U.S.App.D.C. 68, 304 F.2d 944, *cert. denied*, 371 U.S. 901 (1962); *Arizona State Tax Comm'n v. Ensign*, 75 Ariz. 376, 257 P.2d 392 (1953); *State v. Martin*, 62 Wash. 2d 645, 384 P.2d 833 (1963).

[14] Unlike the situation here, the practices complained of in *Southern Pacific, supra*, had existed openly for many years with only perfunctory protests from the affected taxpayer. We do not believe, however, that the factual difference is a

together with other similar claims threatens the financial solvency of many taxing units of the state. . . ."[15] 95 Ariz. at ——, 377 P.2d at 778. Significantly, the court so held despite the fact that the taxpayer relied upon a statutory provision which allowed for refund of illegally collected taxes. On this point, the court said:

> The State's grace does not extend to its own destruction. Clearly this was not within the contemplation of the legislature in the enactment of the refunding statute. [95 Ariz. at ——, 377 P.2d at 778.]

In their presentations both here and in the trial court, appellees have stressed that the District's treatment of this matter, although perhaps well intentioned, was not characterized either by candor or adherence to principles of good fiscal management, but this does not justify the granting of refunds. However erroneous such practices have been found to be, they cannot, consistently with the objects of equity jurisprudence, be viewed in isolation

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significant one. Although the Arizona Supreme Court was critical of the inaction on the part of the railroad in the face of long-standing discriminatory assessment, the refunds sought were for only one-half of one fiscal year (rather than for the entire period of discrimination) and the decision not to grant refunds was based on that demand, which "together with other similar claims" posed a threat to governmental stability.

[15] Although refunds were not at issue, much the same considerations were taken into account by the three-judge district court in *Weissinger v. Boswell*, 330 F. Supp. 615 (M.D. Ala. 1971). In that case, Alabama's ad valorem property tax program was held discriminatory and unconstitutional but expressing concern about the fiscal impact of its decision, the court allowed the Commissioner of Revenue up to one year from the date of its opinion to equalize assessments. *Id.* at 625.

or without regard to the practical consequences which the requested retrospective relief would have. This court is confronted with the task of attempting to reconcile competing claims to equity, these being the financial interest of the assumedly wronged appellees on the one hand, and the financial interest of the District of Columbia as it relates to all of the people whom it serves, on the other hand.[16]

Appellees represent to this court that an average of $41 per taxpayer is at stake here and that the aggregate refunds sought in this particular litigation would amount to from $1.1 million to $1.6 million.[17] Appellees state that the total refund amount would be insignificant in light of the District's budget of approximately $1 billion, and that the District has recently foregone greater sums by voluntarily reducing the debasement factor applied to commercial property from 65% to 55%.

We do not agree. The sums at issue here are not insignificant by any realistic standard, whether absolute or relative; and this decision may be considered to have precedential effect in future class action tax refund cases.

The funds collected for fiscal year 1973 have already been disbursed for governmental purposes which have benefited all of the citizens of the District of Columbia and the refunds sought here would have to be financed

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[16] Another implication of appellees' arguments has been that they seek by means of this suit to serve a general interest in good government by encouraging fairness and openness on the part of officials of the District. We believe, however, that this interest has been vindicated by the result in *Green*.

[17] Appellees' estimates below were an average refund of approximately $50 per taxpayer, with some as little as $10 or less and a total of $1.5 to $1.75 million.

through increased taxes or decreased services. It has been stated in a somewhat similar situation, that

> [a]s government is dependent on taxation for its maintenance, the local subdivision that levied the illegal or unconstitutional tax would have to tax the taxpayers to raise the necessary money to return to them the illegal or unconstitutional tax collected. In other words, the taxpayers would have to be paid the illegal tax, paid by them, out of their own pockets. Such a ceremony would be idle and vain. [*Dupre v. City of Opelousas*, 161 La. 272, ——, 108 So. 479, 481 (1926).]

Thus, not only did the taxpayers not pursue the statutory procedures, but under these particular circumstances the adverse impact of refunds on the entire citizenry of the District outweighs the economic interest of the property owners who paid the taxes at issue.[18]

Appellees in this case have come to the courts seeking equity but equity has already been done by the first *Green* case, *supra*, where a mandatory injunction was affirmed despite this jurisdiction's anti-tax injunction statute. D.C. Code 1973, § 47-2410.[19] After a balancing

[18] The second opinion of this court in *District of Columbia v. Green*, D.C.App., 348 A.2d 305 (1975) is not to the contrary. Our decision there was simply an implementation of the first *Green* case (310 A.2d 848 (1973)) and it did not run to tax refunds for a prior fiscal year.

[19] D.C. Code 1973, § 47-2410: "No suit shall be filed to enjoin the assessment or collection by the District of Columbia or any of its officers, agents, or employees of any tax." Injunctive relief notwithstanding the existence of an anti-tax injunction statute is not entirely unprecedented, but it may be granted only in the most exceptional and stringent circumstances. *Bob Jones Univ. v. Simon*, 416 U.S. 725 (1974); *Enochs v. Williams Packing and Navigation Co.*, 370 U.S. 1 (1962).

of all interests in this case, we conclude that the public interest would be disserved by a grant of the refunds sought. In *Green*, we went as far as equity requires us to go and so we will not go further here.

While application of the principles of equity occasionally may be appropriate in tax litigation (*e.g.*, *Green*) it would hardly aid the financial stability of this city if this court were to relax the statutory requirements of our Code as they relate to tax litigation and superimpose equity jurisprudence on these statutory requirements. This should be done only in a rare case (*e.g.*, *Green*). Otherwise, financial instability would be promoted. Tax statutes are necessarily formalistic and often technical. It is essential that we adhere to their technicalities, even if at times a seeming hardship results to the taxpayer. *See, e.g., George Hyman Construction Co. v. District of Columbia*, D.C.App., 315 A.2d 175, 178 (1974). Among other things, fiscal considerations require that this be done. Where class action tax refunds for fiscal years in the past are at issue, the relief sought would not emanate from some inexhaustible treasury. The reality is that the funds could only be supplied by an additional tax on innocent taxpayers,[20] or the reduction of services, in an already financially beleaguered city. Only in extraordinary circumstances, not here present, should the equity relief sought be afforded.

Accordingly, the judgment of the trial court is

Reversed with instructions to dismiss the complaint.

[20] This would include taxpayers in the class here seeking relief.

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
TAX DIVISION

ARTHUR H. KEYES, JR., et al.,	:	
	:	
Petitioners	:	
	:	
v.	:	NO. 2214
	:	
THE DISTRICT OF COLUMBIA, et al.,	:	
	:	
Respondents	:	

OPINION AND ORDER

This matter is before the Court pursuant to the action denominated as Taxpayers' Suit for Refund of Tax for Fiscal Year 1973 Illegally Assessed which, in essence, seeks refunds for approximately 34,000 persons owning single-family residential property in the District of Columbia (including residential garages and vacant land zoned for single family residential use).

It is alleged that these 34,000 persons were taxed, and paid their taxes, for Fiscal Year 1973 at a level of assessment

(debasement factor) of 60 percent of estimated market value and that these taxpayers should be assessed for taxation at the same level of assessment (debasement factor) of 55 percent of estimated market value as were assessed some 62,378 other owners of single-family residential property in the District of Columbia for the same Fiscal Year 1973.

The Petitioners aver that fixing a level of assessment for real property is rule-making within the meaning of the District of Columbia Administrative Procedure Act and that failure to give notice to the District of Columbia single-family residential property owners that the level of assessment of their properties was in the process of change, deprived the taxpayers of the due process afforded by the D.C.A.P.A. and invalidated the increased taxes assessed at 60% of estimated market

value.

It is also contended that the intentional and arbitrary actions of Respondents in applying unequal levels of assessment (55% and 60%) to estimated market value within the same class of single-family residential properties is violative of the Fifth Amendment rights under the Constitution of the United States of the Petitioners and others similarly situated to them.

As a result of the above, the Petitioners request refunds which are to be measured by the difference between the tax bill rendered and paid for Fiscal Year 1973 at a level of assessment of 60% of estimated market value and the tax bill as it should have been assessed for Fiscal Year 1973 at a level of assessment (debasement factor) of 55% of estimated market value, plus interest at 6% per annum.

The Respondents have answered that the petition fails to state a claim upon which relief can be granted and that this Court is without jurisdiction to hear and determine this matter; they also deny the tax bills for Fiscal Year 1973 were in any way illegally rendered, deny Petitioners can maintain this action as a class action for themselves and all others claimed to be similarly situated and deny they have violated the D.C.A.P.A. or that the taxpayers have been deprived of the due process required by the D.C.A.P.A. They do:

> "...admit that all taxpayers were not assessed at the same level of assessment (debasement factor) for Fiscal Year 1973..."1/

At the same time the taxpayers' suit was filed and Respondents answered, the District of Columbia Court of Appeals had

1/ Answer of Respondents, Par. 6.

yet to hear argument and render decision, on an expedited basis, in Green, et al v. District of Columbia, et al., D.C.App., 310 A.2d 848 (1973). Accordingly, in a motion to place the instant case upon the reserve calendar pending the Green decision, Respondents referred to Petitioners' contention that the present case involves the same Respondents and similar Petitioners and a claim of res judicata for facts and questions of law decided June 29, 1973 in Green, and said that "[w]hen a decision is rendered by the appellate court, this case may be governed by that decision."

Thereafter, Respondents moved to extend the time in which to file their response to Petitioners' Motion to Submit Case Without Trial until 30 days after final decision was reached in Green, supra.

> "...According to Petitioners, the final decision on that appeal would be res judicata of the present case for both facts and questions of law. Thus, in accordance with Petitioners' premise, until that case is finally decided it would be undesirable for this Court to require an answer to Petitioners' Motion..."

After the appellate decision in Green, although specifically stating they had no objection to the Green trial record becoming part of this Keyes trial proceedings, the Respondents formally opposed Petitioners' Motion to Submit Case Without Trial because:

> "Respondents herein wish to proffer to this Court the testimony of witnesses to fully present the assessment system used by the District for purpose of real property taxation for Fiscal Year 1973."2/
>
> "While the District of Columbia presented explanations in a trial

2/ Par. 2 of Opposition to Petitioners' Motion to Submit Case Without Trial.

before this Court in Clarzell Green, et al. v. District of Columbia, et al, D.C. Tax Court Case 2213, District of Columbia Court of Appeals 7539, it was limited in its amplification of the tax assessment methods because the hearing was conducted as an expedited proceeding."3/

Also, Respondents contended that, absent certain unspecified procedures to be followed by Petitioners in order that the matter be handled as a class action, those procedures entered in a case before another Judge of this Court could be followed in this one.

The Respondents claimed that it did not admit facts averred by the Petitioners nor did they stipulate to any facts.

In consideration of the above on November 21, 1973 this Court denied Petitioners' Motion to Submit Case Without Trial and set the trial date, alterations of which have resulted for several reasons.

3/ Par.3 of Opposition to Petitioners' Motion to Submit Case Without Trial.

Subsequently, for the convenience of the litigations and also in light of the Court's other and continuing judicial obligations,4/ it was agreed between counsel and the Court that there would first be a determination of the Petitioners' plea of res judicata or collateral estoppel by judgment, and Respondents' Opposition to same, prior to the commencement of testimony, if any, in this cause. If the Court agreed with Petitioners' contentions, a hearing with accompanying testimony and documentation would become unnecessary. If the Court agreed with Respondents' position, the hearing would be scheduled to completion with temporary suspension of the Court's other responsibilities.

Accordingly, Petitioners filed their

4/ Felony II assignment through January 1974;
Arraignment Court for February 1974;
Misdemeanor Trials for March 1974;
Preliminary Hearings for April 1974.

Motion for Judgment on the grounds of collateral estoppel by judgment or res judicata and Memoranda of Law in support thereof. The Respondents have filed their Opposition in the nature of a Memorandum and oral argument was heard on the 5th of March 1974.

The Court agrees with the Petitioners, as expressed in their oral argument, that the principle of collateral estoppel, not the principle of res judicata, is applicable here. Lawlor v. National Screen Service Corp., 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122 (1955), relied on by both parties, well defines the effect of the doctrine of collateral estoppel.

> "The basic distinction," said Chief Justice Warren, "between the doctrines of res judicata and collateral estoppel, as those terms are used in this case, has frequently been emphasized. Thus, under the doctrine of res judicata, a judgment 'on the merits' in a prior suit involving the same parties or their privies bars a

> second suit based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, such a judgment precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit."

See, also, Tutt v. Doby, 459 F.2d 1195 (1972), 148 U.S.App.D.C. 171.

In the classic case of Cromwell v. County of Sac,[5/] illustrating the distinction between the direct effect of a judgment as res judicata and its collateral effect, Justice Field stated:

> "...where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the in-

5/ 94 U.S. 351, 352-353, 24 L.Ed. 195 (1877).

> quiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

The principle of collateral estoppel embraces matters both of fact and law, and it is clear that one must look to the pleadings forming the issues and must examine the record for a determination of the questions essential to the decision of the earlier litigation:

1. Whether the issue sought to be concluded is the same as that involved in the prior action?

2. Was the issue litigated in the prior action?

3. Was the issue judicially determined in the prior action?

4. Whether the judgment in the prior action was dependent upon the determination made of the issue?6/

6/ Cf. United Shoe Machinery Corp. v. United States, 285 U.S.451,459, 42 S.Ct.363, 66 L.Ed. 708 (1922). If the parties could have reasonably foreseen the conclusive effect of their action, eminent authority holds the principle of collateral estoppel properly applicable. Moore's Fed. Prac.Vol.1B,§0.444; Tutt v. Doby, supra, at p.1200.

If the above questions are affirmatively answered, the issue is concluded under the doctrine of collateral estoppel.

Or, to put it another way: the essence of collateral estoppel by judgment is that some fact or question in dispute has been judicially and finally determined by a court of competent jurisdiction between the same parties or their privies. If the second action involved a different claim, different demand or different cause, the judgment in the first suit operates as a collateral estoppel only as to those matters which were in issue or controverted and upon the determination of which the original judgment necessarily depended.

As noted, the doctrine of collateral estoppel is operative where the second action is between the same persons who were parties to the first action.

"A judgment for the plaintiff

in the first action may have the effect of enabling him to recover in the second action without proving the facts constituting his cause of action, provided that those facts were litigated and determined in the prior action; but the defendant is not precluded from defending the second action on grounds not litigated and determined in the first action."7/

These rules are also applicable

> "...to periodic taxes, such as successive income taxes or property taxes. If in an action between the taxing authority and the taxpayer an issue of fact is litigated and determined by a judgment with reference to the tax on one year, the determination is conclusive if the same issue is raised between the taxing authority and the taxpayer with reference to the tax of a subsequent year."8/

The doctrine of estoppel by judgment has long been applied in the Federal

7/ Restatement of Judgments (1942) §68a, at p. 295.

8/ Restatement of Judgments (1942) §68c, at p. 299.

Courts in the tax field. The case of Com'r. v. Sunnen,9/ (concerning federal income tax consequences of intra-family assignments of income) held that a prior income tax judgment is res judicata only in

> "...a subsequent proceeding involving the same claim and the same tax year",

and confined the doctrine of collateral estoppel to

> "...situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged."10/

With application of the doctrine of res judicata it has been repeatedly held that the parties are concluded in a suit for one year's tax as to the right or question adjudicated by a former judgment respect-

9/ 333 U.S. 591, 68 S.Ct. 715, 92 L.Ed. 898 (1948).

10/ Com'r. v. Sunnen, supra, 333 U.S. 591, 599-600.

ing the tax of an earlier year. City of New Orleans v. Citizens' Bank, 167 U.S. 371, 17 S.Ct. 905, 42 L.Ed. 202:

> "It follows, then, that the mere fact that the demand in this case is for a tax for one year, and the demands in the adjudged cases were for taxes for other years, does not prevent the operation of the thing adjudged, if, in the prior cases the question of exemption was necessarily presented and determined upon identically the same facts upon which the right of exemption is now claimed." (at p. 398)

Compare, also, among others, Tait v. Western Maryland Ry. Co., 289 U.S. 620, 53 S.Ct. 706, 77 L.Ed. 1405; Deposit Bank v. Frankfort, 191 U.S. 499, 24 S.Ct. 154, 48 L.Ed. 276.

By application of collateral estoppel both the government and the taxpayer are relieved of "redundant litigation of the identical question of the statute's application to the taxpayer's status."11/

11/ Tait v. Western Maryland Ry. Co., supra, at 624.

Collateral estoppel attempts to preclude the repeated controversy of matters once judicially determined, aiming for judicial finality. It is considered

> "...a reasonable measure calculated to save individuals and courts from the waste and burden of relitigating old issues."12/

Compare the applicability of collateral estoppel to criminal proceedings as an integral part of the protection against double jeopardy guaranteed by the Fifth and Fourteenth Amendments. Once an issue of ultimate fact has been determined by valid and final judgment, that issue cannot again be litigated between the same parties in any future law suit, Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469; Harris v. Washington, 404 U.S. 55, 92 S.Ct. 183, 30 L.Ed.2d 212 (1971).

12/ Tillman v. National City Bank of New York (CCA 2d, 1941) 118 F.2d 631, 634, cert. den. (1941), 314 U.S. 650, 62 S.Ct. 96, 86 L.Ed. 521.

Even when the precise question for determination in a second action (automobile operator-host's negligence versus his passenger) has not been litigated in a technical sense, where the factual and legal issues in the two actions (passenger v. host and motorist; other motorist v. host) are

> "...so interrelated that the result in General Sessions [denying recovery to the host against the other motorist on the ground that both parties were negligent] is properly dispositive of the subsequent action for contributions." Brightheart v. McKay, 420 F.2d 242, 136 U.S.App.D.C. 400 (1969):
>
> "...The critical question in the application of collateral estoppel is whether the parties have had a full opportunity to litigate the issue on which they are estopped...Here, estoppel is invoked as against the person who initiated the action in General Sessions as plaintiff. There is every reason to believe he exerted his full energies to obtain recovery, and sought to avoid any determination of negligence on his part..." (fn. 4)

In its dual function of protecting the public interest in sound judicial administration and protecting litigants against needless, oft-times oppressive, court action, collateral estoppel attains the end result desired: final, but just, determination of every suit.

Respondent's contentions that they now wish to "fully" present the District's assessment system, although they "presented explanations" in the Green trial echoes the refrain sounded by appellant in Tait v. Western Maryland Ry. Co., supra. Tait's appellant argued that the Circuit Court of Appeals:

> "...might well have reached a different result on the merits, if the former case had been more fully and accurately presented."

The Supreme Court disagreed, holding:

> "...the very right now contested arising out of the same facts appearing in this record, was adjudged in the prior proceeding

> ...The [appellant] may not escape the affect of the earlier judgment as an estoppel by showing an inadvertent or erroneous concession as to the materiality, bearing or significance of the facts, provided, as is the case here, the facts and the questions presented on those facts were before the court when it rendered its judgment..."

It has been held by the Maryland Court of Appeals that where it was determined that the taxpayer (a military preparatory school) was entitled to a tax exemption for the year 1950 for certain land by reason of its use for educational purposes, the doctrine of estoppel by judgment was applicable to a claim for a tax on the same properties against the same parties for another tax year (1954). State Tax Commission for Maryland v. Bullis School, Inc., 218 Md. 558, 147 A.2d 849 (1959). In the Bullis case appellee had made a proper showing to establish a tax exemption for the year 1950 which necessitated a finding that the property's use

was for educational purposes entitling an exemption under the appropriate Maryland statutes. Since the original case there was

> "...no material change in the law, the parties and the property are the same as in the present case, and the only testimony taken...showed that the use of the property for the taxable year 1954 was the same as in 1950."

Since the Maryland appellate court could find no questions to be determined in the second action that were not fully litigated in the original case, it affirmed, with costs, holding that the doctrine of estoppel by judgment was properly applied by the court below.

Determination in the case of Green, et al. v. District of Columbia, et al., D.C. App., 310 A.2d 848 (1973), was made after numerous pretrial motions and rulings, substantial discovery (primarily by depositions and computer runs), a full hear-

ing lasting five days, extending over approximately 1,000 pages of transcript, detailed findings of fact and conclusions of law rendered in a 60 page Opinion and Order,[13/] and terminating in a comprehensive 16 page Court of Appeals affirmance,[14/] which, as does the trial court's Opinion and Order, discusses at length the history of real property tax assessment in the District of Columbia. Findings and conclusions are made both in the trial and appellate courts concerning not only Fiscal Year 1974 (the Green case enjoined Respondents from unequally assessing a certain class of taxpayers for Fiscal Year 1974) but also concerning Fiscal Year 1973.

13/ Wash. L. Rep., Vol. 101, No. 172, p. 1737; No. 173, p. 1749; No. 174, p. 1761 (1973).

14/ Green, et al. v. District of Columbia, et al., D.C.App. 310 A.2d 848 (1973).

The Keyes suit claims refunds for Fiscal Year 1973 based on precisely the same substantive issues that confronted the Green trial court:

1. Whether the level of assessment used to determine the assessed value of single-family residential real properties in the District of Columbia was increased from 55 percent of estimated market value to 60 percent of estimated market value in violation of the "rule-making" provisions of the District of Columbia Administrative Procedure act?

2. Whether failure of the taxpayers to timely avail themselves of, and exhaust, administrative remedies precludes the [refund] relief now sought?

3. Whether the relief sought for petitioners should be granted for the benefit of all owners of single-family residential real property in the District of Columbia?

4. Whether unequal levels of assessment (55 to 60 percent of estimated market value) were used for single-family residential properties in the same tax year in violation of the Fifth Amendment to the Constitution of the United States?

As they originally did in the Green case, Respondents contend in the Keyes case that the petition fails to state a claim upon which relief can be granted; that this Court is without jurisdiction; that the tax bills rendered for Fiscal Year 1973 were in no way illegally rendered; that this matter is not maintainable as a class action. The Respondents further deny that they have violated the District of Columbia Administrative Procedure Act or that the taxpayers have been deprived of the due process required by that Act.

It must be noted that when Respondents' Answer to Keyes was filed the Green decision still pended. Subsequently, three months after the Green decision, Respondents filed their Opposition to Motion for Judgment on the Grounds of Collateral Estoppel by Judgment or Res Judicata and on March 5, 1974 presented oral argument

as to this matter. In both their written and oral argument, after the Green decision, Respondents concede that a class action might be appropriate but only if done in some unspecified manner:

> "We have a class action. Fine. We're not contesting that this may very properly be. We're saying if we have a class action, let's do it properly. And let's do it, since we're doing it with refunds, let's do it in a way...that that will close the question once and for all." (transcript of proceedings, Mar. 5, 1974, p. 13,14)

It is difficult, however, to comprehend Respondent's position, which slips and slides, dependent on whether it was formulated in pleadings before the Green decision or in written/oral argument after the Green decision. To wit:

Respondents are not objecting to Petitioner's attempt to have this case tried as a class action--

> "...[but] failure to have this case properly certified as a

> class action may work to the detriment of respondents should they prevail..." (p. 6, Respondent's Opposition to Motion for Judgment on the Grounds of Collateral Estoppel by Judgment or Res Judicata).

Yet, in the very same paragraph, Respondents state that "in no way [do they] waive any objections that they may make at such time as a proper motion to certify this case as a class action is filed with the court."

In an incredible position, the Respondents contend, three months after the appellate decision in Green, that:

> "Respondents note that they are not certain that all single family residential property represents a class in a refund suit and suggest that certain questions such as whether each single family residential property is in fact solely occupied by the owner, or is rental property, or, although occupied by the owner has income producing units therein, may well have to be addressed by the Court at such time as a proper motion is filed."

Even though the Court of Appeals[15/] refers over and again to the "single-family residential class" (p. 854), "same class of property (residential taxpayers)," (p.855), "same class" (p. 855), "one class of real property"; "single family residential property and other classes of real property"; "one class of single-family residential property owners", "single class of residential property owners" (p. 857), Respondents are "not certain that all single family residential property represents a class in a refund suit", and, in effect, would require some 34,000 separate hearings to determine answers to the questions they pose above.

Nowhere now, as to defenses, as to new

15/ Green, et al. v. District of Columbia, et al., supra.

questions of fact, do Respondents claim that the merits of the matter would entitle them to prevail on the fiscal year assessment and taxes. In effect, all they say is that new sales assessment ratio studies concerning Fiscal Year 1973 have been performed since the Green trial. They say further, through their attorney, that:

> "The District of Columbia has no intention of attempting... to have the District rehash the facts that were proven in the previous case...the District was not and did not see fit to put on testimony in depth and detail with regard to a claim for refund...[the Green case was an injunction suit concerning Fiscal Year 1974]...finding that this was an impermissible...level of assessment, with regard to certain householders,...this does not ipso facto give rise to a refund...there is an entirely different body of law that is involved..."

And, later, continuing the same argument in generalities:

> "I will state...that under the facts as already established and

> under the additional facts that the District of Columbia wishes to put before the court with regard to Fiscal Year 1973 that under the overwhelming majority law in the United States of America, the petitioners are not entitled to a refund of taxes for Fiscal Year 1973, whether they be brought in individual cases or whether they be brought in the form of a class action." (transcript of oral argument, Mar. 5, 1974, at pp. 21-22)

Let us, therefore, look to see what Respondents have conceded by virtue of their prior pleadings or briefs, and what has been decided by the Court in Green, et al. v. District of Columbia, et al., which may permit or preclude the use of the doctrine of collateral estoppel.

Respondent's trial brief, filed in the Green case, on June 23, 1973, is clear:

> "In calendar year 1971, the level of assessment was raised from 55% to 60% on approximately one-third of single family residential properties

for FY 1973;..." (p. 31)

In the trial court's Opinion and Order in the Green case it stated as follows:

> "In fiscal year 1973 there were 37,290 changes of all kinds in the assessments in the District of Columbia of which approximately 34,193 (99.61%) were attributable to changes in single family residential property levels of assessment.
>
> "In fiscal year 1974 there were 45,364 changes of all kinds in the assessments in the District of Columbia, of which approximately 40,056 (88.3%) were attributable to changes in single family residential property levels of assessment." (Trial court's Opinion and Order) Wash. L. Rep., Vol. 101, No. 173, at p. 1749.

The taxpayer received and paid his tax bill on real property in the same manner in Fiscal Year 1973 as he was required to do for Fiscal Year 1974. (See Opinion and Order in Green detailing these steps, Wash. L. Rep., Vol. 101, No. 173, at p. 1749.)

The Court of Appeals expostulated in

detail the way an individual real property owner's tax liability was formulated. Upon receipt of a tax bill there were appeal procedures for an unhappy taxpayer, first by complaint to the Board of Equalization and Review and, subsequently, by appeal to the Tax Division of the Superior Court.

> "...in a planned cyclical reassessment program, conceived and orally implemented by the Director of Finance and Revenue, the level of assessment for approximately 33,000 single-family residential properties was changed from 55% to 60% for Fiscal Year 1973, and, in preparing the tax rolls for Fiscal Year 1974, an additional 44,485 single-family properties were debased at 60%..."

The Green case further developed that the public disclosure of the heretofore secretive unequal assessment raises came in June 1973, "far too late to afford the customary relief to approximately 77,485 single-family residential real property taxpayers who are being assessed at 60%

..."

For example,

> "Arthur Keyes, Jr., testified that he did not know the market value of his property ($77,600 remained the same when he received his notice of increase of assessment from $42,682 to $46,560 in calendar year 1971 effective fiscal year 1973). He was also neither aware nor advised that the entire increase came about as the result of a change in the level of assessment from 55% to 60%." (Order and Opinion, Wash. L. Rep., Vol. 101, No. 172, at p. 1741)

It is now settled that the fixing of a level of assessment for real property is rulemaking within the meaning of the District of Columbia Administrative Procedure Act, and it was undisputed in Green that no rules governing the method of assessment of real property have been published. Interpretation or explanation of the words "full and true value" contained in §47-713 of the Code was a rule within the

meaning of the District of Columbia Administrative Procedure Act and its formulation was rulemaking. Accordingly, for a number of years the meaning of "full and true value" of single-family residential properties had been 55% of estimated market value (i.e., 55% debasement factor). This was an unpublished rule. The Court of Appeals, in Green, has held that a change in the debasement factor is rulemaking within the meaning of the District of Columbia Administrative Procedure Act, which must be published with an opportunity for a public hearing.

The District

> "...chose to apply different debasement factors to the same class of property in the same year and, in so doing, denied the [taxpayers] equal protection of the laws by discriminating among residential taxpayers."

It is clear that in Keyes, as in Green, even if the taxpayer had known about the

disparity of the level of assessment, he would have had no chance to successfully challenge his assessment, since the increased debasement factor (55% to 60%) was arbitrarily determined and inflexible. It was not a subjective art, such as is appraisal.

> "The lack of equalization [between taxpayers owning identically valued properties with different assessments] [was] caused by an intentional and arbitrary application of two different debasement factors to identical properties."
>
> "...evidence before the trial court demonstrated the assessments in years where the 'stair steps' were being used caused assessment increase that went above and beyond the increases that would have been caused by property appreciation alone. This should be no surprise, for any raise in the debasement factor must raise the assessment. ...the facts of this case have highlighted the importance to the taxpayer of an accurately stated fair market value; it is the only element in the tax formula to which he can meaningfully object. If real increases in his property assessment are disguised in the form of a

> higher debasement factor, he is totally remediless within the normal avenues for seeking redress."
>
> "...the District cannot now be heard to say in this appeal that in attempting to cure the one allegedly discriminatory method of assessment between single-family residential property and other classes of other real property it can in the process deliberately discriminate between members within the one class of single-family residential property owners..."16/

The Opinion and Order discussed (Wash. L. Rep., Vol. 101, No. 173, p. 1753) the above oral directive to change the level of assessment for single-family residential real properties from 55% to 60% "for all those properties reviewed commencing in calendar year 1971 (for fiscal year 1973) and for calendar year 1972 (for fiscal year 1974)." (Emphasis supplied.) It was admitted in Green that the Finance

16/ Green, et al. v. District of Columbia, et al., supra, at pp. 856, 857.

Director's "policy goal" of 65% was never put into written form and when he ordered the Fiscal Year 1973 level of assessment (debasement factor) he did not publish this change or give public notice or other written notice to the taxpayers.

> "As a result of this, and beginning in calendar year 1971 (notices were mailed out to taxpayers between November 1, 1971 and March 1. 1972. but the assessors' work was accomplished in calendar year 1971 (for fiscal year 1973)) the bills sent out in September 1972 to approximately 34,000 (or to 1/3 of these taxpayers, Respondents contend) of the 96,378 single family residential properties had their level of assessment changed from 55% to 60% of estimated market value.
>
> "In calendar year 1972, for fiscal year 1974, approximately 40,000 more (or to approximately 1/2 of these taxpayers, Respondents contend) single family residential properties had their level of assessment changed from 55% to 60% of estimated market value.
>
> "Presently, 18,893 single family residential properties remain at the 55% level of assessment.

> "The assessment increases in both fiscal years 1973 and 1974 for single family residential properties were represented to the public as increases in property value. But, in fact, the changes of assessment in fiscal year 1973 were due, in over 90% of the cases, solely to a rise in the level of assessment. In fiscal year 1974 about 50% of the rise was due to increases in property value and about 50% to rises in the level of assessment from 55% to 60%.
>
> "Using data derived during testimoney and, in particular, from the Respondents' own figures and projections17/ the following information was obtained for fiscal years 1973 and 1974
>
> | | |
> |---|---|
> | "Total increased assessment single family residences fiscal year 1972-1974 | $203,794,400 |
> | "Increased assessment single family residences fiscal year 1972 - 1974 due to increase from 55% to 60% in the level of assessment ("debasement factor") | $113,713,800 |

17/ Testimony of John E. Rackham, using the records of D.C. Department of Finance and Revenue.

"Increased assessment single family residences fiscal year 1972 - 1974 due to increase in market value (estimated market value) $ 96,080,600[18/]

"This exhibit demonstrates that, as a result of these acts of the District of Columbia in raising the level of assessment (debasement factor) for two years for part of the single family residential properties from 55% to 60%, the assessment of that class of property was increased by $113,713,800 out of a total assessment increase in the same two year period of $209,794,400. The substantial nature of the effect of this change in the level of assessment over this two year period is evident." (Emphasis supplied)

During the trial, in the Green case, the Respondents admitted that in calendar year 1971 (for Fiscal Year 1973), as well as for calendar year 1972 (for Fiscal Year 1974) all changes in assessments were computed at a level of assessment at only 60%, except for minor administrative error.

18/ This was Petitioners' Exhibit 43 in the Green case.

Accordingly,

"[t]he net result of these intentional acts was that in fiscal year 1973 the level of assessment was raised for approximately one-third of the taxpayers of this category--"class" of 96,378 single family residential properties (excluding garages). (see Wash. L. Rep., Vol. 101, No. 174, p. 1764, for Opinion and Order)

An assessor-witness testified that "poor" neighborhoods were assessed in Fiscal Year 1973, and when the estimated market value was reduced for the Fiscal Year 1973, then the level of assessment was raised from 55% to 60%.

It was pointed out in Green, that in Fiscal Year 1973 whole neighborhoods were assessed from 55% to 60% level of assessment, even those with less than 20% of changes in the estimated market value. Old City and Kalorama were illustrative.

As Assessor Beal testified in the Green trial: He accomplished assessing

approximately 2,000 single family residential properties there for the Fiscal Year 1973. There were a "lot of decreases" [in estimated market value] and a "majority of increases". Probably "all" of the 2,000 properties assessed in Fiscal Year 1973 were changed; "I do not think any did not go to 60%. However, some may have kept the same estimated market value." Whether the estimated market value was reduced or increased made no difference: the level of assessment would still be 60%. (Wash. L. Rep., Vol. 101, No. 174, p. 1765).

Therefore, it was found that those taxpayers who by-passed the Board of Equalization and Review could not have known of the changed level of assessment until June 1973 and were, accordingly, denied viable access to the statutory administrative procedure within the permissible time. In any event, under the extraordi-

nary circumstances of the case, there was, in reality, no effective administrative remedy and any appeal thereto would have been useless. "The evidence of record supports the finding of the trial court..."19/

> "When the assessment is void, the taxpayer must resort to equity for relief, without following statutory remedies...", citing Tumulty v. District of Columbia, 69 App.D.C. 390, 399-400, 102 F.2d 254, 263-64 (1939).

How could the taxpayers in Keyes complain timely to the Board of Equalization and Review of an increase in their Fiscal Year 1973 real property tax assessment (from 55% to 60%) when they were clearly unaware of any raise in the level of assessment, and when they were unaware of two levels of assessment existing for the same class of single-family residential properties. Just as in Green, they were

19/ Green, et al. v. District of Columbia, et al., supra, at p. 853.

effectively denied an adequate administrative and legal remedy.

Respondents contend this Court is without jurisdiction to entertain the present action. The Court completely disagrees and cites Green for authority. It would be unbelievable to have jurisdiction to enjoin an invalid, void, unconstitutional, arbitrary, invidious tax assessment for one fiscal year (1974); yet require detailed, duplicative testimony, at substantial waste of taxpayers' additional monies to pay for the presentation of testimony, covering identical matters, for Respondents suggested 34,000 individual hearings, to consider whether or not the issues previously presented in Green for Fiscal Year 1974 are the same issues germane to a determination of Keyes for Fiscal Year 1973.

As the trial court said in Green,

"Should the Court adopt Res-

pondents' argument it would, in effect, add yet another dimension of inequity to a situation already surrounded by unfairness, secrecy and lack of candor. It would be tantamount to telling a taxpayer that he must pay thousands of dollars and that he must yield days, weeks and months of his effort to develop testimony and documentation at his individual high expense to reap, in return, a few dollars in the majority of cases (and hundreds or more of dollars in other cases) just to have the right to present constitutional argument and to exhibit that which is already before this Court. Would not this attitude in and of itself be a coercive device on the taxpayers to not pursue their due remedies because of financial and time inability?"

The Court has gone into great detail [and has avoided the temptation to cite substantive and further examples] to illustrate the multiple reasons the Court finds that the principle of collateral estoppel is significantly appropriate to the Keyes case. Accordingly, there shall be no testimony taken in the Keyes tax case.

Respondents pray the opportunity to plead the law applicable to refunds in general and to this case in particular. Petitioners had earlier requested the Court fix a time for filing briefs and for oral argument. Both requests were made prior to the written and oral argument concerning the applicability of collateral estoppel, which necessarily embraced--at least in part--the law pertaining to refunds. Nevertheless, fairness dictates that the parties have the full opportunity, if they still so desire, to develop in writing their respective positions concerning applicable law before a final determination of this case. [There shall be no further oral argument thereon.]

Accordingly, if the parties, or any of them, wish to file written briefs (optional as far as the Court is concerned) they may do so, as follows:

Petitioners to file written brief, if any, on or before May 6, 1974; Respondents to file written brief, if any, on or before May 16, 1974, following which the matter shall stand submitted.

/s/ Joyce Hens Green
Joyce Hens Green
Judge

April 25, 1974

Copies to counsel of record.

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
TAX DIVISION

ARTHUR H. KEYES, JR., et al., :

Petitioners :

v. : NO.2214

THE DISTRICT OF COLUMBIA, et al., :

Respondents :

OPINION AND ORDER

For fullest comprehension and compliance this matter must be considered in context with the Court's detailed Opinion and Order of April 25, 1974[1/] holding the principle of collateral estoppel significantly appropriate to the instant case as a result of Green, et al. v. District of Columbia, et al., D.C. App., 310 A.2d 848 (1973).

Counsel had requested the opportunity to file written briefs which have since

1/ Wash. L. Rep., Vol. 102, No. 99, p.1029, (1974).

been filed and considered.

There are questions of law or fact common to the members of this class of taxpayers, including equal protection under the Fifth Amendment to the Constitution of the United States and the statutes of the District of Columbia, which predominate over any questions affecting only individual members, and a class action would be superior to other available methods for fair and efficient administration of the controversy. Members of the class on behalf of whom petitioners sue are so numerous that joinder of all members is impracticable. The claims of petitioners are typical of and applicable to the claims of all members of the class and petitioners have fairly and adequately represented and protected the interests of all members of the class. Prosecution of separate actions by members of the class would create a

risk of inconsistency or varying adjudications with respect to individual members of the class which would, as a practical matter, be dispositive of the interests of the other members of the class not parties to the adjudications.

Nevertheless, Petitioners' action does not require certification as a class action and notice to its members. Separate rules have been adopted by the Board of Judges for civil actions and for tax actions, and the Tax Division has neither adopted nor incorporated by reference the Civil Division class action Rule 23 or any other rule pertaining to class actions.

The facts in this case, as in Green, supra, are so exceptional and extraordinary as to merit extraordinary and exceptional relief that justice compels under the inherent and general equity powers of the Court. Accordingly, this cause is

determined as a taxpayers' suit in equity in the nature of an uncertified class action brought on behalf of the individual petitioners and all others similarly situated.2/

Petitioners and the approximate 34,000 other similarly situated owners of single family residential properties in the District of Columbia were taxed, and paid their taxes, for Fiscal Year 1973 at a level of assessment (debasement factor) of 60 percent of estimated market value.

2/ Crampton v. Zubrinskie, 101 U.S. 601, 25 L. Ed. 1070 (1880). Yokley, Municipal Corporations:

> "It is an essential element of a taxpayer's suit that the suit be brought in behalf of a plaintiff and other citizens and taxpayers.
>
> "A taxpayer's suit is necessarily a class action. It must be brought not by individuals, but by individuals, for themselves and for all of the citizens similarly situated." Vol. 4, Sec. 602, p.36.

Petitioners seek in the form of refunds the difference between what was actually paid by these taxpayers and what should have been paid had a level of assessment of 55 percent of estimated market value been used, plus interest at 6 percent per annum computed from the date payment was made until the date of refund.

In applicable substance, Green held that the increases in property tax assessment from 55 percent to 60 percent of estimated market value were invalid because they were based on an arbitrary, intentional, and discriminatory change by Respondents in the level of assessment (debasement factor) applied to petitioners and some 34,000 other taxpayers for Fiscal Year 1973 and not applied for the same Fiscal Year 1973 to approximately 62,378 other owners of single family residential real property in the District of Columbia. Green further held that the

changes were nullified by their creation in violation and disregard of the District of Columbia Administrative Procedure Act. The taxpayers had ". . .no meaningful ability to challenge his assessment at all"[3/] when the District choose to apply different debasement factors to the same class of property in the same year because the taxpayer was not aware that he was being treated differently from his neighbor and that he was being denied equal protection of the laws. He was therefore effectively denied his administrative remedy and his timely complaint to court.

Put succinctly, as did the Court of Appeals in Green:

> ". . .irrespective of whether the District may constitutionally differentiate in the level of assessment applied to residential real

3/ Green, supra, at p. 856.

> property as opposed to commercial real property,. . .it clearly may not do so within the single class of residential property owners." at p.857.

Accordingly, Green ordered the level of assessment for Fiscal Year 1974 reduced to 55 percent of estimated market value (by enjoining any other percentage level of assessment) until and unless a level of assessment was established after full compliance with the District of Columbia Administrative Procedure Act and further provided that only equal levels of assessment were to be used.

In summary,[4/] the Court finds that the same factors exist here as in Green: the taxpayers were deprived of due process and there has been discrimination among the citizens of the same class of single family residential properties. Some taxpayers have been assessed at 60 per-

4/ For fuller expostulation, see the Opinion and Order of April 25, 1974, Wash. L. Rep., Vol. 102, No. 99, p. 1029, (1974).

cent of estimated market value, and paid their taxes accordingly, while others in the same class were assessed and paid their taxes at 55 percent of estimated market value. This is clearly in violation of the due process clause of the Fifth Amendment to the Constitution of the United States as it applies to the Petitioners individually and to those similarly situated.[5/]

It is frequently stated that a taxpayer must pay his just share for the just and orderly functioning of his Government. It is never proclaimed that a taxpayer should pay his unjust, inequitable, disproportionate share. If he does--and errors can occur--then the (Federal) Government upon review refunds the excess, with interest. It is manifest that the municipal government should do no less. "Monies illegally exacted from a

5/ Bolling v. Sharpe, 347 U.S. 497 (1954).

citizen taxpayer by its Government must be promptly refunded. To hold otherwise would be unconscionable."

The Court concludes that the Petitioners and the approximate 34,000 others similarly situated are, upon computation of the appropriate sums, entitled to prompt refunds of the amounts overpaid, with corresponding interest, in consideration of the above invalid assessment and then collection of taxes not rightfully due and owing. The Court further concludes that Respondents, by access to the District of Columbia's data sources, tax rolls, finance department, and computers, are in an unique position to exactly ascertain and yield the information necessary from which the full and fair refund can be made.

A decision concerning counsel fees and costs will be rendered upon the final determination of the amounts to be refund-

ed to each citizen.

Having determined the issues in this matter, the Court is withholding entry of the amount of refunds due to each member of the class of single family residential real property owners whose property was incorrectly and illegally assessed at a level of assessment (debasement factor) in excess of 55 percent of estimated market value, to allow the parties, pursuant to Superior Court Tax Rule 15, to submit computations of the amounts due to each person pursuant to the findings and conclusions entered in this case.

It is therefore, this 6th day of August, 1974:

ORDERED:

(1) the [sic] the Respondents submit to Petitioners by August 27, 1974 computations of the amounts due, in accordance with the findings entered in this case, to each owner of single family residen-

tial real property whose property was assessed in Fiscal Year 1973 at a level of assessment (debasement factor) in excess of 55 percent of estimated market value. These computations shall include the names and addresses of each person entitled to a refund, each property for which a refund is due, the amount of taxes which were paid, the amount of taxes which should have been paid, and the basis on which this calculation was made (e.g. estimated market value), and the refund due.

(2) That the Petitioners shall examine the computations prepared by the Respondents and notify both the Court and Respondents by no later than September 17, 1974 as to whether they are in agreement with the computations of the Respondent as to the amounts of refunds due.

(3) That the Respondents shall make such information available to Petitioners

as will enable them to fully and adequately review the computations made by Respondents;

(4) That if the parties are in agreement as to the amount of the refund due to be entered as the decision pursuant to the findings and conclusions made by the Court, the Respondents shall file, within three (3) days after being notified by Petitioners that they are in agreement, with the Deputy Clerk for the Tax Division an original and 2 copies of a computation showing the amount of the refund due, together with a statement to the effect that there is no disagreement and that the figures shown are in accordance with the findings and conclusions of the Court. A decision will then be entered accordingly.

(5) That if, however, the parties are not in agreement as to the amount of the

refund due, they shall notify the Court of the basis of their disagreement by no later than September 20, 1974. Pursuant to the procedure set forth in Superior Court Tax Rule 15 (b) to be followed in the absence of agreement, either party may file with the Deputy Clerk for the Tax Division a computation of the amounts of refunds believed by such party to be in accordance with the findings and conclusions of the Court and shall serve a copy of those computations on the opposing party. The matter will then be scheduled by the Court for argument. If the opposite party fails to file an objection accompanied by an alternative computation at least 5 days prior to the date of such argument or any continuance thereof, the Court may determine to enter decision in accordance with the computation already submitted.

(6) That if computations are submitted

by the parties which differ as to the amount to be entered as the decision, the parties shall be afforded an opportunity to be heard in argument thereon on the date fixed, and the Court shall determine the amount of refund due and enter its decision accordingly. Pursuant to Superior Court Tax Rule 15(c), any argument shall be confined to the consideration of the correct computation of the amount of refunds due resulting from the findings and conclusions theretofore made, and no argument shall be heard upon or consideration given to any new issues or to the issues or matters already disposed of by such findings and conclusions. The hearing shall not be regarded as affording an opportunity for rehearing or reconsideration.

/s/ Joyce Hens Green
Joyce Hens Green
Judge

Copies to Counsel .

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 7539

DISTRICT OF COLUMBIA, A Municipal Corporation,
and
WALTER E. WASHINGTON,
and
KENNETH BACK, APPELLANTS,

v.

CLARZELL GREEN, ET AL., APPELLEES.

Appeal from the Superior Court of the District of Columbia

(Argued September 7, 1973 Decided October 9, 1973)

Louis P. Robbins, Assistant Corporation Counsel, with whom *C. Francis Murphy*, Corporation Counsel, and *Henry E. Wixon*, *Robert E. McCally*, *Richard W. Barton*, *David P. Sutton*, *Kenneth A. Pels* and *Richard L. Aguglia*, Assistant Corporation Counsels, were on the brief, for appellants.

Gilbert Hahn, Jr., with whom *Jack C. Sando* was on the brief, for appellees. *Philip W. Amram*, *Daniel G. Grove* and *Steven L. Engelberg* also entered appearances for appellees.

Before Reilly, Chief Judge, and Kelly and Nebeker, Associate Judges.

KELLY, *Associate Judge:* This appeal is from an order entered in the Superior Court, Tax Division, enjoining appellants from using, for purposes of taxation of single-family residential properties within the District of Columbia, unequal levels of assessment of estimated market value in determining the assessment, valuation or equalization of such properties, and from assessing such properties at a level of assessment other than 55% of estimated market value unless and until an equal level of assessment is established by the District after full compliance with the provisions of the District of Columbia Administrative Procedure Act (DCAPA).[1] The issues outlined by appellants for review are (1) whether the trial court erred in holding temporarily unequal single-family property levels of assessment (debasement factors)[2] of 55% and 60% to be unconstitutionally discriminatory when such temporary inequality resulted from a city-wide cyclical reassessment work program designed to ultimately equalize all single-family property assessments with the multi-family and commercial properties debased at 65%; (2) whether the trial court's holding compels an unconstitutional discrimination against multi-family and commercial properties and 20% of the single-family properties in the District of Columbia; (3) whether the development of a cyclical assessment program designed to bring certain properties into compliance with constitutional and statutory mandates for equalization is "rulemaking" within the meaning of the DCAPA, and (4) whether the failure of some appellees to exhaust

[1] D.C. Code 1972 Supp., § 1-1501 *et seq.*

[2] The terms "level of assessment" and "debasement factor" are used interchangeably throughout this opinion.

their administrative remedies and of others to pursue their statutory legal remedies precluded the trial court from granting injunctive relief. Appellees are in substantial agreement with the issues appellants present for review, demurring only to the suggestion that any question of a constitutionally prohibited discrimination against owners of properties in categories other than single-family properties is embraced within or even relevant to this appeal.

I

In brief explanation of the essential background to this appeal, there are three components of the mathematical process used to determine the dollar amount of tax due the District from an individual owner of real property each year; namely, the market value of the property, the debasement factor (level of assessment) to be applied to that value to determine the assessment (assessed value), and the tax rate. Market value (also referred to as estimated market value) is the fair market value of a particular property as determined from time to time by District assessors. The debasement factor is the percentage of market value upon which the tax will be levied. The tax rate is expressed in terms of dollars per hundred and is currently $3.32 per each $100 of an individual property's assessed value.

The assessment for an individual taxpayer is determined by multiplying the market value of the property by the debasement factor or level of assessment.[3] The tax rate applied to the assessed value of the property is set by the City Council after notice published in the District of Columbia Register and, like the level of

[3] Example: A house valued at $100,000 with a debasement factor of 60% is assessed at $60,000 and taxed at the rate of $3.32 per $100 of assessed value—$1,992.00.

assessment, is fixed. The third component of the above equation, market value, is a variable with each individual property having a unique estimated value. Upon receipt of a tax bill, an aggrieved taxpayer may complain of an alleged unfair assessment to the Board of Equalization and Review (Board)[4] and, beyond that, appeal to the Tax Division of the Superior Court.[5]

For several years immediately prior to calendar year 1969, if not before, all single-family residential properties in this city had a debasement factor of 55% and all multi-family residential, commercial and industrial real property was assessed at 65% of estimated market value. Thereafter, in a planned cyclical reassessment program, conceived and orally implemented by the Director of Finance and Revenue, the level of assessment for approximately 33,000 single-family residential properties was changed from 55% to 60% for fiscal year 1973, and, in preparing the tax rolls for fiscal year 1974, an additional 44,485 single-family properties were debased at 60%.[6] The level of assessment of nearly 19,000 single-family residential properties remained at 55%.

Of the 44,485 taxpayers who at the end of 1972 received notices of assessments for fiscal year 1974, only 1,044 appealed, three of whom somehow ascertained the existence of, and raised as an issue, the increased level of assessment of their properties. Of the eleven named petitioners below (appellees), five unsuccessfully complained to the Board of Equalization and Review of alleged unfair assessments; six did not so complain. This

[4] D.C. Code 1972 Supp., § 47-709; § 47-2405.

[5] D.C. Code 1972 Supp., § 11-1202.

[6] Assessment is done on a calendar year basis for the following fiscal year.

class action was brought by petitioners on behalf of themselves and others so situated to enjoin the respondents (appellants) from applying the 60% debasement factor against their properties unless and until the same level of assessment was applied to all single-family residential properties within the District after compliance by the District with the pertinent provisions of the DCAPA. After a lengthy trial the court granted appellees the relief sought, accompanying its order with a comprehensive and learned memorandum opinion with which we are in full accord.[7]

The critical factors upon which we focus in our decision are (1) that the District's cyclical reassessment program was undertaken in a manner which resulted in unequal levels of assessment within a single class of assessed property, and (2) that no notice was given to District of Columbia single-family residential property owners that the level of assessment of their properties was in the process of change.

II

Relying upon D.C. Code 1967, § 47-709, appellants challenge the jurisdiction of the trial court to determine the claims of the six appellees who failed to complain of their increased assessments to the Board, alleging a failure to exhaust their administrative remedies;[8] assert

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[7] WASH. L. REP., Vol. 101, No. 172, p. 1737; No. 173, p. 1749; No. 174, p. 1761 (1973).

[8] D.C. Code 1972 Supp., § 47-709:

> The valuation of the real property made and equalized as aforesaid shall be completed not later than the first Monday of May annually. The valuation of said real property made and equalized as aforesaid shall be approved by the Commissioners not later than July 1, annually, and when approved by the Commissioners shall constitute the basis of taxation for the next succeeding year and until another valuation is made according to law, except as hereinafter provided. Any person aggrieved by any assessment, equalization or valuation made may within six months after October 1 of the year in which such assessment, equalization, or valuation is made, appeal from such assessment, equalization, or valuation in the same manner and to the same extent as provided in sections 47-2403 and 47-2404: *Provided, however,* That such person shall have first made his complaint to the Board of Equalization and Review respecting such assessment as herein provided, except that, in case of increase of valuation of real property over that for the immediately preceding year, where no notice in writing of such increase of valuation is given the taxpayer prior to March 1 of the particular year, no such complaint shall be required for appeal.

that the appellees who did complain to the Board are barred from suit by language in D.C. Code 1972 Supp., §§ 47-2403—2405 specifying that the court may not entertain a taxpayer's petition until after October 1, and after payment of the tax in full, and claim that the trial court erred in issuing an injunction in the face of D.C. Code 1967, § 47-2410 which provides that

> No suit shall be filed to enjoin the assessment or collection by the District of Columbia or any of its officers, agents, or employees of any tax.

These jurisdictional points are not pressed with vigor here, each of the parties preferring a decision on the merits. Consequently, we simply point out that appellants' latter argument would be readily accepted except that the trial court found the facts of this case to be so exceptional and extraordinary as to merit equitable relief and, as the Court said in *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498, 509 (1932):

> [W]here complainant shows that in addition to the illegality of an exaction in the guise of a tax there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence, a suit may be maintained to enjoin the collector. . . . [Citations omitted.] [9]

Additionally, the trial court found that since the six named petitioners (appellees) who bypassed the Board could not have known of the changed level of assessment until it was reluctantly made public in this lawsuit in June of 1973, they were unable to pursue the administrative remedy created by statute prior to cutoff date of April 1, 1973.[10] It also found, in effect, that under the extraordinary circumstances of this case, outlined at length in its memorandum opinion and not repeated here, the petitioners who did not appeal to the Board were in reality afforded no effective administrative remedy. Moreover, the court saw no reason to require the parties who in good faith sought administrative review to wait until October 1 to apply for relief, after payment of tax, when those bypassing the useless administrative procedure were permitted to proceed, stating that to accept such an argument "would, in effect, add yet another dimension of inequity to a situation already surrounded by unfairness, secrecy and lack of candor." [11] The evidence of record supports the findings of the

[9] *See also Allen v. Regents of University System of Georgia*, 304 U.S. 439 (1938).

[10] In its words: "The court is not persuaded by this argument and cannot believe that Congress intended that the statute be subverted to include deceit of the populace, by either unintentional oral and written misinformation (at best) or by deliberate misstatement (or deliberate omission) of oral and written information (at worst)." R. at 666.

[11] R. at 667.

trial court and, as a consequence, it was not error to entertain the petition for injunction. As the Circuit Court said in *Tumulty v. District of Columbia*, 69 App. D.C. 390, 399-400, 102 F.2d 254, 263-64 (1939):

> We think it clear that all administrative remedies in matters of taxation must be exhausted before resort can be had to court action. Nelson v. First Nat. Bank, 8 Cir., 42 F.2d 30, but think *it equally clear that when the assessment is void, the taxpayer may resort to equity for relief, without following statutory remedies.* . . . [Emphasis supplied.]

III

Appellees successfully contended in the trial court that the fixing of a level of assessment for real property is rulemaking within the meaning of the District of Columbia Administrative Procedure Act.[12] They conceded there, and concede here, that prior to the effective date of the DCAPA appellants had a right to make a rule setting the level of assessment at 55% of market value for residential property in the District and 65% of market value for commercial property without notice to or opportunity by the public to be heard. Conceded also is appellants' right at any time to change the level of assessment of residential property to a higher percentage of market value if it is done in compliance with the pertinent provisions of the DCAPA.

Appellants argue that the Constitution and the per-

[12] D.C. Code 1972 Supp., § 1-1507(c). The DCAPA, effective October 21, 1969, required that all administrative rules then in effect be published in the District of Columbia Register by October 21, 1970. It is undisputed that no rules governing the method of assessment of real property have been published.

tinent statutory provision [13] governing assessment of real property compel the same level of assessment be applied to *all* real property in the District of Columbia; consequently, any change in the level of assessment for single-family residential property in the process of accomplishing equalization in assessment does not constitute a rule within the meaning of the DCAPA.

D.C. Code 1972 Supp., § 1-1502(6) and (7) defines the terms "rule" and "rulemaking" as:

> (6) the term "rule" means the whole or any part of any Commissioner's, Council's, or agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of the Commissioner, Council, or of any agency;
>
> (7) the term "rulemaking" means Commissioner's, Council's, or agency process for the formulation, amendment, or repeal of a rule;

The trial court found, correctly we think, that the interpretation or implementation of the words "full and true value" contained in § 47-713 of the Code was a rule within the meaning of § 1-1502(6) and its formulation was rulemaking within the definition of § 1-1502(7).

The meaning of "full and true value" of single-family residential properties had for a number of years been 55% of estimated market value. This 55% debasement factor, albeit unpublished, was, under the Code definition, a rule. Both the tax rate and the debasement factor are fixed values in the assessment equation. The setting of the tax rate by the City Council is admittedly a rule which must be published, with an opportunity for a public hearing provided for by the DCAPA. Setting or changing the debasement factor affects the final tax bill in exactly the same manner as does the setting of the rate, and to allow the debasement factor to be secretly established or changed would completely frustrate the purpose of being able to review the tax rate later when it is set each year.

[13] D.C. Code 1967, § 47-713, provides in pertinent part:

> All real estate in the District of Columbia subject to taxation, including improvements thereon, shall be listed and assessed at not less than the full and true value thereof in lawful money.

Appellants argue that since they are constitutionally required to achieve equalization of the level of assessment of all real property, commercial and residential, a change of the debasement factor is not rulemaking within the meaning of the DCAPA. Should this constitutional requirement exist, however, it does not compel the conclusion that the District may not be required to accomplish its goal by constitutional means or that the necessary changes of levels of assessment in the process are not rules and rulemaking as defined in the DCAPA.

This court has held that a Commissioner's Order directing the Department of Human Resources to set the level of public assistance payments at 75% of the public assistance standards to be a rule, stating that "Commissioner's Order No. 70-265, whether we consider it an *implementing* directive, as Corporation Counsel characterizes it, or *prescribing* policy, is a 'rule' as defined by the D.C. APA. . . ." [Footnote omitted.] *Junghans v. Department of Human Resources*, D.C.App., 289 A.2d 17, 23 (1972). A like holding is required here.

IV

Appellants contend that the tax policy of the District has always been to uniformly apply a 65% debasement

factor to *all* real property in the District of Columbia, both residential and commercial. This "policy", however, has never been articulated to the general public and was apparently unknown to some assessors. The facts are that until 1969 the District compiled and used a real estate assessment manual designed to achieve a debasement of 65% of value, there being no identifiable market value at that time to debase. Sales ratio studies undertaken in 1968 revealed, however, that some single-family residential properties were actually debased as low as 40%, although the desired 65% factor for multi-family and commercial properties was substantially achieved. As a result, the District developed a reassessment program to equalize single-family residential properties with other real property at a 65% level of assessment. In an effort to accomplish a common debasement factor while maintaining relative equalization within the single-family residential class a "stair-step" approach was decided upon as the means to attain the desired result over a period of time, an approach necessitated both by budgetary and manpower considerations. The debasement factor of all single-family residential properties was first raised to 55%, the next planned step being to raise the level of assessment to 60% and the final goal being to elevate the debasement factor of all such properties to 65%. Thus, the level of assessment on over 33,000 single-family residential properties was raised to 60% in fiscal 1973, and an additional 44,485, those at issue in this case, had been entered on the tax rolls for fiscal 1974 at 60%. Approximately 19,000 properties remain debased at 55%.

The District of Columbia has no rule dividing real property into various classes for the purpose of taxation. The only requirement of these *ad valorem* taxes is that they be administered in a fashion that results in equali-

zation of the tax burden on all property owners.[14] The amount of a property owner's tax bill must be related as nearly as possible to the value of his property as compared to the value of the property of others. The ratio of his property's value to the total value of property in the District should parallel the amount of tax he pays compared to total taxes paid by all property owners.

Equalization depends directly on a fair and critical assessment of each piece of real property in the District. As expert witnesses for the District testified, assessment is an art which requires an experienced eye. It is therefore important, if taxes are to be equalized, that individual assessments be done thoroughly. Appellants have stressed that they have been unable, due to fiscal and manpower shortages, to effectuate an adequate assessment of all property in the District each year, and this is understandable. Under such circumstances a cyclical assessment program may be permissible, provided any inequalities resulting therefrom are of an accidental and temporary character. *See, e.g., Sunday Lake Iron Co. v. Wakefield*, 247 U.S. 350 (1918); *Johnson v. County of Ramsey*, 290 Minn. 307, 187 N.W.2d 675 (1971); *Carkonen v. Williams*, 76 Wash.2d 617, 458 P.2d 280 (1969) (en banc); *Skinner v. New Mexico State Tax Commission*, 66 N.M. 221, 345 P.2d 750 (1959). Indeed, appellees agree that if the District had engaged in a cyclical program of adjusting the fair market value of properties in the city one group at a time, this case would not have arisen. But the District did not follow this course. Instead, as the record shows, it chose to apply different debasement factors to the same class of property in the

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[14] *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 526 (1959); *Hillsborough T P v. Cromwell*, 326 U.S. 620 (1946); *Colgate v. Harvey*, 296 U.S. 404, 423 (1935); *Wells Fargo & Co. v. Johnson*, 214 F. 180 (8th Cir. 1914), *aff'd*, 239 U.S. 234 (1915).

same year and, in so doing, denied the appellees equal protection of the laws by discriminating among residential taxpayers.[18]

In the case of *Weissinger v. Boswell*, 330 F. Supp. 615, 621-22 (M.D. Ala. 1971), the court declared unconstitutional under Alabama's *ad valorem* property tax system the application of two different levels of assessment to the same class of property, stating that ". . . while the Fourteenth Amendment does not require precise equality or uniformity in taxation, or prohibit inequality in taxation which results from mere mistake or error in judgment of tax officials, it does 'secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.' . . ." [Footnotes omitted.]

The justification the District offers for the admitted intentional disparity of debasement factor applied to taxpayers within the same class is that the "stair-step" approach was the only way to bring all properties to the uniform level of assessment of 65% without seriously frustrating the only long-range goal of the tax system—equalization. The trial court did not accept the logic of this conclusion, nor can we.

The only variable in the tax equation for real property is the estimated fair market value. As the District admits, when the real estate market and other factors cause the fair market value to fluctuate, nearly constant reassessment is necessary, though not always feasible. If actual fair market value is determined by the amount realized in an arm's length sale of property, a comparison between the latest assessed value and this sales value constitutes the assessment/sales ratio. The disparity between the two values is expressed by a dispersion coefficient. The higher the coefficient, the greater the difference between the last assessed fair market value and the fair market value indicated by sale. Various factors may account for such a difference, but in any event the Board of Assessors is interested in minimizing the coefficient of dispersion.

[18] *Bolling v. Sharpe*, 347 U.S. 497 (1954), reads the Fourteenth Amendment equal protection clause into the due process clause of the Fifth Amendment to apply it to the District of Columbia.

The assessment/sales ratio may well vary in different parts of the District, and even within the same block. This disparity inevitably produces the undesirable result of placing unequal tax burdens on persons owning property with the same fair market value. For example, if two different taxpayers own property identical in fair market value but one property is currently assessed at a higher value than the other due to the inability of the assessors to value all property every year, taxpayers owning property of identical values pay different tax bills. As another example, if the property of each of these taxpayers is currently assessed at the same market value but as part of a "stair-step" approach to reach a uniform 65% debasement value one level of assessment rises to 60% while the other remains at 55%, the taxpayers owning property worth the same amount in the taxable year have different tax bills.

In neither of the above examples has the goal of equalization been reached. Yet the two situations are distinguishable in important ways. In the first situation the lack of equalization between taxpayers is undesirable but permissible because caused by logistical problems which may be temporarily beyond the power of the city to correct. In the second case the lack of equalization is caused by an intentional and arbitrary application of two

different debasement factors to identical properties.[16] The aggrieved taxpayer in the first example may complain to the Board of Equalization and Review if he feels that his assessment is too high and, since the assessment of fair market value is admittedly a rather subjective art, by requesting reconsideration of his valuation, he may be successful in lowering his assessment. The facts of the instant case show that in the second example the aggrieved taxpayer has no meaningful ability to challenge his assessment at all. No judgment would be made in his case as the new debasement factor was arbitrarily determined as was its applicability to certain real property.

Estimated market value, being the only variable in the equation determining the amount of tax owed, would appear to be the factor to be periodically adjusted to reflect changes in property values which the District recognizes occur for many different reasons that are difficult to forecast. If the District desires, or feels compelled, to apply an equal debasement factor across the board to all real property within the District, however, the proper course would be to formulate such a rule and publish it in accordance with the procedure prescribed by the DCAPA. An immediate raise to 65% might well be politically unpleasant, as the District clearly recognized but, if the need to raise the level of assessment to 65% is as compelled as the District contends, this result is unavoidable. Moreover, it is just as unavoidable using the "stair-step" approach although perhaps not as visible. In fact, evidence before the trial court demonstrated the assessments in years where the "stair

[16] The District argues that one of its exhibits in evidence demonstrates that in reality the differential in levels of assessment resulted in greater equalization than before, but appellees disagree and the trial court did not so find, nor was it required to do so.

steps" were being used caused assessment increases that went above and beyond the increases that would have been caused by property appreciation alone. This should be no surprise, for any raise in the debasement factor must raise the assessment. The fair market value cannot be held below its true level while the debasement factor is inched towards 65% simply to keep taxes the same, at least if the concept of fair market value is to have any clear and understandable meaning. And as already mentioned, the facts of this case have highlighted the importance to the taxpayer of an accurately stated fair market value; it is the only element in the tax formula to which he can meaningfully object. If real increases in his property assessment are disguised in the form of a higher debasement factor, he is totally remediless within the normal avenues for seeking redress.

Finally, appellants complaint that the trial court's order "convert[s] a relatively equalized tax roll into a patently discriminating tax roll."[17] The trial court determined that the assessments at issue were void because of a differential in levels of assessment within one class of real property, and the District cannot now be heard to say in this appeal that in attempting to cure one allegedly discriminatory method of assessment between single-family residential property and other classes of real property it can in the process deliberately discriminate between members within the one class of single-family residential property owners. Therefore, irrespective of whether the District may constitutionally differentiate in the level of assessment applied to residential real property as opposed to commercial real property, a question which we need not and do not here decide, it clearly may not do so within the single class of residential property owners.

Affirmed.

[17] Appellants' brief at 12.

DISTRICT OF COLUMBIA
COURT OF APPEALS

FILED FEB 27 1976

ALEXANDER L. STEVAS
Clerk

NO. 8790

THE DISTRICT OF COLUMBIA
A Municipal Corporation, and
WALTER E. WASHINGTON, and
KENNETH BACK,

Appellants,

v. Tax 2214

ARTHUR H. KEYES, JR., and
LUCILLE KEYES,
On behalf of themselves and
others similarly situated,

Appellees

BEFORE: Kelly and Gallagher, Associate Judges, and Pair, Associate Judge, Retired.

O R D E R

This cause came on for consideration on the record on appeal and the Court heard argument of counsel. A question has arisen which the parties did not cover in their briefs, and accordingly, the Court desires the parties to submit supplemental memoranda addressed to the following

question:

Bearing in mind (a) that this Court in District of Columbia v. Green (310 A. 2d 848 (1973) specifically approved the trial court's finding that an injunctive remedy was available in that case due to the "exceptional and extraordinary" circumstances there presented (at 853) and (b) that this Court recently reiterated that proposition in District of Columbia v. Burlington Apartment House Co. T/A The Vurlington Hotel., D.C.App., ___ A.2d ____(no. 7986, January 29, 1976) at pages 4-5 of the slip opinion, are the appellees in this case barred from the relief sought by reason of their failure to pursue their statutory remedies in seeking refunds for the fiscal year here involved? In addressing themselves to the question, the parties should discuss District of Columbia v. Berenter, 151 U.S.App. 196, 466 F.2d 367 (1972).

Counsel for appellants shall cause their supplemental memorandum to be filed on or before March 8, 1976, and counsel for appellees shall cause their memorandum to be filed on or before March 15, 1976, and counsel shall cause their respective pleadings to be personally served on opposing counsel.

Per Curiam

Supreme Court, U. S.
FILED
MAR 25 1977
MICHAEL RODAK, JR., CLERK

BRIEF FOR RESPONDENTS IN OPPOSITION

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1169

ARTHUR H. KEYES AND LUCILLE KEYES, on behalf of themselves and others similarly situated,
Petitioners,

v.

THE DISTRICT OF COLUMBIA, a Municipal Corporation and WALTER E. WASHINGTON, and KENNETH BACK,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

JOHN R. RISHER, JR.
Corporation Counsel, D.C.

LOUIS P. ROBBINS,
Principal Assistant Corporation Counsel, D.C.

ROBERT E. MCCALLY,
Assistant Corporation Counsel, D.C.

HENRY E. WIXON,
Assistant Corporation Counsel, D.C.

DAVID P. SUTTON,
Assistant Corporation Counsel, D.C.

RICHARD L. AGUGLIA,
Assistant Corporation Counsel, D.C.

Attorneys for Respondents,
District Building,
Washington, D.C. 20004
Telephone: 629-3921

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IN THE

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OCTOBER TERM, 1976

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v.

THE DISTRICT OF COLUMBIA, a Municipal Corporation and WALTER E. WASHINGTON, and KENNETH BACK,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the holding of the District of Columbia Court of Appeals that petitioners' failure to seek administrative relief in a timely manner, under congressional enactments having strictly local application, foreclosed their claims for tax refunds, rises to a level of importance sufficient to warrant the exercise of this Court's certiorari jurisdiction.

2. Whether the District of Columbia Court of Appeals (after invalidating the future use by respondents of different levels of assessment as unconstitutional) acted in accordance with equitable principles enunciated by this Court in declining to give its ruling retroactive effect by requiring a refund well in excess of $1 million to petitioners whose previously remitted tax monies had since been disbursed for governmental purposes.

STATEMENT

On July 19, 1973, petitioners Arthur and Lucille Keyes, Jr., on behalf of themselves and all other taxpayers similarly situated, filed suit in the Tax Division of the Superior Court of the District of Columbia for a refund of a portion of the real property taxes paid for fiscal year 1973.[1] Petitioners alleged that the property tax assessments for fiscal year 1973 for their single-family home in the District, as well as those of approximately 34,000 other single-family residence, were based on an undisclosed and unconstitutional change by respondents in their level of assessment[2] from 55% to 60% of estimated market value. They contended that notice of the 60% level of assessment was neither disclosed to them until their time for taking administrative appeals had expired nor published in accordance with the District of Columbia Administrative Procedure Act. In addition, the 60% level of assessment was not applied for fiscal year 1973 to approximately 62,378 owners of single-family residences in the District of Columbia, thus creating two separate and unequal classes of single-family taxpayers. (Pets.' App. A16 - A18.)

[1] Assessments of real property in the District of Columbia are made on a calendar year basis for the subsequent fiscal year. Fiscal year 1973 began on July 1, 1972 and ended on June 30, 1973.

[2] The level of assessment is the percentage of estimated market value upon which the District's real property tax rate was levied. All real property in the District of Columbia is now assessed at 100% of estimated market value as required by P.L. 93-407 (88 Stat. 1053; Sept. 3, 1974).

Petitioners sought a refund for themselves and all other taxpayers similarly situated which was to be measured by the difference between their tax bills for fiscal year 1973 at a level of assessment of 60%, and those same tax bills at a level of assessment of 55%. (Pets.' App. A4.)

On March 5, 1974, petitioners moved the trial court for judgment in their favor in this case on the grounds of collateral estoppel, contending that the material questions of fact and law relating to fiscal year 1973 in this case were litigated in *District of Columbia* v. *Green,* 310 A.2d 848 (D.C.App., 1973).

Respondents opposed petitioners' motion for judgment, stressing that as *Green* was a suit for injunctive relief for fiscal year 1974, the District did not in that case put into evidence testimony regarding refunds for fiscal year 1973 which it wished to present in this case.

In *Green,* the District of Columbia Court of Appeals upheld the trial court's order enjoining as unconstitutionally discriminatory the District's planned cylical reassessment program to raise the level of assessment to 60% for some 44,000 single-family residences in fiscal year 1974. In fiscal year 1973, under this program, the District revised the level of assessment for approximately 34,000 single-family residential properties from 55% to 60% (giving rise to this suit), and planned to raise the remaining residential properties to a 60% level of assessment in fiscal year 1975 to complete assessment uniformity of all single-family properties in the District of Columbia.[3] (Pets.' App. A74-A89.)

On April 24, 1974, the trial court ordered that no testimony would be taken in this case, agreeing with petitioners that, because the principle of collateral estoppel was ap-

[3] Under D.C. Code 1973, § 47-713:

> All real estate in the District of Columbia subject to taxation, including improvements thereon, shall be listed and assessed at not less than the full and true value thereof in lawful money.

plicable, all material questions of fact and law had already been decided against respondents in *Green*. (Pets.' App. A4-A5.)

On August 6, 1974, the trial court held that petitioners and the approximately 34,000 taxpayers situated were entitled to prompt refunds of the amounts overpaid, with corresponding interest.

In reversing, the District of Columbia Court of Appeals held that petitioners were not entitled to refunds either under the applicable statutes in force in the District of Columbia or by virtue of equitable principles. In so holding, the Court concluded that petitioners failed to make timely claims for refunds under the applicable legislative scheme. The Court further concluded that while the prospective injunctive relief granted in *Green* was warranted under the circumstances of that case, retrospective application of *Green* in a manner which required refunds of taxes and a related disbursal from the public treasury of over a million dollars previously spent for governmental purposes could not be squared with equitable principles. (Pets.' App. A2 - A15.)

Following the denial by the Court of Appeals of petitioners' motion for rehearing and for rehearing *en banc*, petitioners petitioned this Court for a writ of certiorari.

REASONS FOR DENYING THE WRIT

Petitioners advance no ground for review falling within the standards and considerations governing review on writ of certiorari as prescribed by Rule 19 of the Rules of this Court. And see *Fields* v. *United States*, 205 U.S. 292, 296 (1907). The instant case involves a challenge to a holding of the District of Columbia Court of Appeals that it was without subject matter jurisdiction to hear this case because petitioners and other taxpayers similarly situated failed to pursue their administrative remedies for fiscal

year 1973 as required by local law. In that connection, D.C. Code 1973, § 47-709 reads in pertinent part as follows:

> Any person aggrieved by any assessment, equalization or valuation made may within six months after October 1 of the year in which such assessment, equalization, or valuation is made, appeal from such assessment, equalization, or valuation in the same manner and to the same extent as provided in sections 47-2403 and 47-2404; *Provided, however,* That such person shall have first made his complaint to the Board of Equalization and Review respecting such assessment as herein provided. . . .

Petitioners' argument that they were unable to exhaust their administrative remedies because of concealment on the part of respondents was properly rejected by the District of Columbia Court of Appeals in its opinion as follows:

> Appellees contend that the administrative remedies could not have been pursued by any of the taxpayers for fiscal year 1973 because of prior concealment of the "stair-step" plan by District officials. In *Green*, however, we noted that three petitioners "ascertained the existence of, and raised as an issue, the increased level of assessment of their properties" before the Board of Equalization and Review for fiscal year 1974. *District of Columbia* v. *Green, supra* at 851. These taxpayers not only pursued their administrative remedies but in the process also discovered the now prohibited practice of applying different debasement factors to similarly situated taxpayers. Consequently, we cannot assume, as the trial court did in the case now before us, that a timely administra-

> tive challenge to the 1973 taxes for the purpose of obtaining refunds was unavailable or would have been fruitless. The 1973 taxpayers were just as aware as the 1974 taxpayers that their tax bills had been increased. (Pets.' App. 7.)

Under these circumstances, which involve a matter of purely local significance, absent a clear showing of egregious error, and here there is no such showing, this Court has consistently refused to exercise its jurisdiction. See *American Security and Trust Co.* v. *District of Columbia,* 224 U.S. 491 (1912); *Del Vecchio* v. *Bowers,* 296 U.S. 280 (1935); *District of Columbia* v. *Pace,* 320 U.S. 698 (1944); *United Surety Co.* v. *American Fruit Product Co.,* 238 U.S. 140 (1915); *Griffin* v. *United States,* 336 U.S. 704 (1949), rehearing denied, 337 U.S. 921 (1949); *Fisher* v. *United States,* 328 U.S. 463 (1946).

Indeed, the dismissal of the present suit by the Court of Appeals because of petitioners' failure to pursue a complete and adequate remedy is in accord with prior decisions of this Court. In *Burrill* v. *Locomobile Co.,* 258 U.S. 34 (1922), this Court held that an action against the state treasurer to recover excise taxes alleged to have been unconstitutionally collected from foreign corporations was barred because of the foreign corporations' failure to petition the highest state court of Massachusetts within six months after payment of the tax as required by an exclusive state remedy. In *Anniston Mfg. Co.* v. *Davis,* 301 U.S. 337 (1937), this Court found the reasoning in *Burrill* applicable to the situation presented there and stated:

> The Government has not denied its obligation to refund the amounts found in the authorized proceeding to be recoverable, but has recognized that obligation. In such a case, the substitution of an exclusive remedy directly against the Government is not an invasion of constitutional right. 301 U.S. 343.

Moreover, the holding of the District of Columbia Court of Appeals that the denial of refunds and the withholding of retrospective relief was equitably[4] appropriate under the circumstances presented, is in complete harmony with this Court's decisions.

Although the District's stair-step approach to achieve a uniform level of assessment as required by D.C. Code 1973, § 47-713, was held in *Green* to be impermissible in its application to certain single-family properties, the Court of Appeals recognized the salutary purpose of the stair-step program in that case as follows:

> **The facts are that until 1969 the District compiled and used a real estate assessment manual designed to achieve a debasement of 65% of value, there being no identifiable market value at that time to debase. Sales ratio studies undertaken in 1968 revealed, however, that some single-family residential properties were actually debased as low as 40%, although the desired 65% factor for multi-family and commercial properties was substantially achieved. As a result, the District developed a reassessment program to equalize single-family residential properties with other real property at a 65% level of assessment. In an effort to accomplish a common debasement factor while maintaining relative equalization within the single-family residential class a "stair-step" approach was decided upon as the means to attain the desired result over a period of time, an approach necessitated both by budgetary and manpower considerations. The debasement factor of all single-family residential properties was first raised to 55%, the next planned step being to raise the level of assessment**

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[4] Contrary to the position taken by petitioners herein, the District of Columbia Court of Appeals noted that this suit "***was brought in equity and was decided solely on equitable grounds." (Pets.' App. A5.)

> to 60% and the final goal being to elevate the debasement factor of all such properties to 65%. Thus, the level of assessment on over 33,000 single-family residential properties was raised to 60% in fiscal 1973, and an additional 44,485, those at issue in this case, had been entered on the tax rolls for fiscal 1974 at 60%. Approximately 19,000 properties remain debased at 55%. (Pets.' App. A84.)

Additionally, the exhibits attached to respondents' briefs in the trial court demonstrated a relatively equalized assessment roll for all District of Columbia single-family residential property owners in fiscal year 1973 even with the use of unequal assessment levels. And, as a result of *Green,* all real property in the District of Columbia was assessed at a single level (55%) in fiscal year 1975 by administrative order of the Director of the Department of Finance and Revenue. Furthermore, the refunds sought had already been spent for the benefit of District of Columbia residents.

Refunds to petitioners, under these circumstances, would promote financial instability, increase taxes or decrease services and be tantamount to paying taxpayers out of their own pockets. Prospective relief only, therefore, was appropriate and, in similar circumstances, has been utilized as the most equitable remedy by this Court and various state courts. In *Cipriano* v. *Houma,* 395 U.S. 701 (1969), a Louisiana law gave only "property taxpayers" the right to vote in elections called to approve the issuance of revenue bonds by a municipal utility. While finding the challenged provisions violated the Equal Protection Clause of the Fourteenth Amendment, the Court refused to give its decision full retroactive effect, stating that:

> Significant hardships would be imposed on cities, bondholders, and others connected with municipal utilities if our decision today were given full retroactive effect. Where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity. Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 364, 77 L Ed 360, 366, 53 S Ct 145, 85 ALR 254 (1932). See Chicot County Drainage Dist. v Baxter State Bank, 308 U.S. 371, 84 L Ed 329, 60 S Ct 317 (1940). Cf. Linkletter v Walker, 381 US 618, 14 L Ed 2d 601, 85 S Ct 1731 (1965). Therefore, we will apply our decision in this case prospectively. That is, we will apply it only where, under state law, the time for challenging the election result has not expired, or in cases brought within the time specified by state law for challenging the election and which are not yet final. Thus, the decision will not apply where the authorization to issue the securities is legally complete on the date of this decision. 395 U.S. 706.

See also *Lemon* v. *Kurtzman,* 411 U.S. 192 (1973).

In *Pennsylvania* v. *Williams,* 294 U.S. 176, 185 (1935), this Court emphatically stated that, where the public interest is involved:

> ***courts of equity may, and frequently do, go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.

Cf., Reynolds v. *Simms,* 377 U.S. 533 (1964). And see, *Weissinger* v. *Boswell,* 330 F. Supp. 615 (N.D. Ala. 1971); *Switz* v. *Middletown Twp.,* 130 A.2d 15 (N.J. 1957); *Southern Pacific Co.* v. *Cochise County,* 377 P.2d 770 (Ariz. 1963)

and *Arizona State Tax Commission* v. *Ensign*, 257 P.2d 392 (Ariz. 1953); *Johnston Businessmen's Assoc.* v. *Russillo*, 274 A.2d 433 (R.I. 1971).

CONCLUSION

Upon the foregoing, it is respectfully submitted that the petition for a writ of certiorari should be denied.

JOHN R. RISHER, JR.
Corporation Counsel, D.C.

LOUIS P. ROBBINS,
Principal Assistant Corporation Counsel, D.C.

ROBERT E. MCCALLY,
Assistant Corporation Counsel, D.C.

HENRY E. WIXON,
Assistant Corporation Counsel, D.C.

DAVID P. SUTTON,
Assistant Corporation Counsel, D.C.

RICHARD L. AGUGLIA,
Assistant Corporation Counsel, D.C.

Attorneys for Respondents,
District Building,
Washington, D.C. 20004

Telephone: 629-3921